Supreme Court, U.S.
FILED
AUG 29 2016
OFFICE OF THE CLERK

No. 15-497

In the Supreme Court of the United States

STACY FRY, ET VIR, AS NEXT FRIENDS OF MINOR E.F., PETITIONERS

v.

NAPOLEON COMMUNITY SCHOOLS, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether 20 U.S.C. 1415(*l*) requires petitioners to exhaust the state administrative procedures set forth in the Individuals with Disabilities Education Act, 20 U.S.C. 1400 *et seq.*, before bringing their civil action seeking money damages for past violations of the Americans with Disabilities Act of 1990, 42 U.S.C. 12101 *et seq.*, and the Rehabilitation Act of 1973, 29 U.S.C. 701 *et seq.*

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INTEREST OF THE UNITED STATES

This case involves the relationship between the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. 12101 *et seq.*, the Rehabilitation Act of 1973, 29 U.S.C. 701 *et seq.*, and the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. 1400 *et seq.* As relevant here, the Department of Justice has authority to bring civil actions to enforce Title II of the ADA, 42 U.S.C. 12131-12165, and Section 504 of the Rehabilitation Act, 29 U.S.C. 794 (2012 & Supp. II 2014), and it has promulgated regulations implementing Title II. See 29 U.S.C. 794a; 42 U.S.C. 12133, 12134(a); 28 C.F.R. Pt. 35. The Department of Education administers the IDEA; it has promulgated regulations implementing that statute and Section 504; it has authority to investigate and administratively enforce compliance with Section 504; and it has the au-

thority to investigate, negotiate administrative resolutions, and refer unresolved Title II matters to the Department of Justice. See 20 U.S.C. 1406(a); 29 U.S.C. 794a; 34 C.F.R. Pts. 104, 300; see also 28 C.F.R. 35.190(b)(2); 34 C.F.R. 104.61. At the Court's invitation, the United States filed a brief at the petition stage urging this Court to grant review and reverse the decision below.

STATEMENT

The question presented in this case is when the IDEA requires a litigant to exhaust the IDEA's administrative procedures before bringing a civil action under Title II of the ADA or Section 504 of the Rehabilitation Act. The court of appeals held that the IDEA can sometimes require exhaustion of such claims even when the only relief that the plaintiff seeks is not available under the IDEA. Pet. App. 6.

1. a. The ADA and Rehabilitation Act protect individuals with disabilities from discrimination. Title II of the ADA provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. 12132. The Department of Justice has promulgated implementing regulations requiring, *inter alia*, that a public entity make "reasonable modifications [to its] policies, practices, or procedures * * * [that] are necessary to avoid discrimination." 28 C.F.R. 35.130(b)(7). As relevant here, the regulations also generally provide that such entities "shall modify [their] policies, practices, or procedures to permit the use of a service animal by an individual with a disability." 28 C.F.R. 35.136(a). Title II authorizes

private citizens to bring suits for money damages to redress violations of its requirements. *Tennessee* v. *Lane*, 541 U.S. 509, 517 (2004).

Section 504 provides that "[n]o otherwise qualified individual with a disability * * * shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C. 794(a); see 28 C.F.R. 41.51(a); 34 C.F.R. 104.4(a). Section 504 served as a model for Title II of the ADA, and the same liability standards generally apply to both statutes. See, *e.g.*, 42 U.S.C. 12201(a). The Rehabilitation Act authorizes private citizens to bring suits for money damages to redress violations of Section 504. See *Lane*, 541 U.S. at 517; see also 29 U.S.C. 794a(a)(2).

b. The IDEA (formerly known as the Education for All Handicapped Children Act) provides federal grants to States "to assist them to provide special education and related services to children with disabilities." 20 U.S.C. 1411(a)(1). States and school districts receiving IDEA funds must make a "free appropriate public education" (FAPE) available to every eligible child with a disability residing in the State. 20 U.S.C. 1412(a)(1)(A); see 20 U.S.C. 1401(9) (defining FAPE).

As the "centerpiece" of the FAPE requirement, school districts must provide each eligible child with an "individualized educational program" (IEP). *Honig* v. *Doe*, 484 U.S. 305, 311 (1988). A proper IEP must establish a program of special education and related services that is designed to meet the "unique needs" of the child. *Ibid.*; 20 U.S.C. 1412(a)(4); 34 C.F.R. 300.22, 300.34.

The IDEA requires school districts to work collaboratively with parents to formulate an appropriate IEP for each child with a disability.[1] But Congress anticipated that this process would not always produce a consensus, and it established procedures by which parents can seek administrative and judicial review of a school district's IDEA-related determinations. See 20 U.S.C. 1415(f)-(j); *School Comm. of Burlington* v. *Department of Educ.*, 471 U.S. 359, 368-369 (1985) (*Burlington*).

As a general matter, parents who are not satisfied with a proposed IEP, or with other matters relating to the "identification, evaluation, or educational placement of the child, or the provision of a [FAPE]," must first notify the school district of their complaint. 20 U.S.C. 1415(b)(6); see 20 U.S.C. 1415(b)(7). If the dispute cannot be resolved through established procedures, the parents may obtain "an impartial due process hearing" before a state or local educational agency. 20 U.S.C. 1415(f)(1)(A)-(B); see 20 U.S.C. 1415(g) (authorizing administrative appeal to state educational agency if initial hearing is conducted by local agency). The hearing officer in such proceedings must make the decision "on substantive grounds based on a determination of whether the child received a [FAPE]." 20 U.S.C. 1415(f)(3)(E)(i).

The IDEA permits a party aggrieved by the hearing officer's decision to file a civil action under the IDEA. 20 U.S.C. 1415(i)(2)(A). Although "judicial review is normally not available" under the IDEA "until all administrative proceedings are completed," "par-

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[1] See, *e.g.*, 20 U.S.C. 1400(d)(1)(B), 1414(b)(2)(A), (d)(1)(B), (3)(A)(ii), (D), (4)(A)(ii)(III), and (e), 1415(b)(1), (3)-(5), and (f)(3)(E)(ii)(II).

ents may bypass the administrative process where exhaustion would be futile or inadequate." *Honig*, 484 U.S. at 326-327 (interpreting 20 U.S.C. 1415(e)(2) (1982), the predecessor to 20 U.S.C. 1415(i)(2)(A)); see Supp. Br. in Opp. 9 & n.3; see generally *McCarthy* v. *Madigan*, 503 U.S. 140, 148 (1992) (stating that an administrative remedy is "inadequate" when the agency "lack[s] authority to grant the type of relief requested").

A court adjudicating an IDEA case must receive the records of any prior administrative proceedings, and it may hear additional evidence before rendering its decision. 20 U.S.C. 1415(i)(2)(C). In deciding the case, the court must give "due weight" to the result of any state administrative proceedings. *Board of Educ. of the Hendrick Hudson Cent. Sch. Dist.* v. *Rowley*, 458 U.S. 176, 206 (1982).

The IDEA empowers courts hearing IDEA cases to "grant such relief as the court determines is appropriate." 20 U.S.C. 1415(i)(2)(C)(iii). This Court and the courts of appeals have generally recognized that the relief available under the IDEA is equitable in nature and encompasses both (1) future special education and related services that ensure a FAPE or redress past denials of a FAPE, and (2) financial compensation to reimburse parents for past educational expenditures that should have been borne by the State. See, *e.g.*, *Burlington*, 471 U.S. at 369-370. The Court has expressly distinguished such relief from compensatory "damages," *id.* at 370-371, and it has further made clear that the IDEA does "not allow for damages," *Fitzgerald* v. *Barnstable Sch. Comm.*, 555 U.S. 246, 254 n.1 (2009).[2]

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[2] See, *e.g.*, *Polera* v. *Board of Educ. of the Newburgh Enlarged City Sch. Dist.*, 288 F.3d 478, 485-486 (2d Cir. 2002) (citing cases);

c. In *Smith* v. *Robinson*, 468 U.S. 992 (1984), this Court held that the IDEA's predecessor statute was the *exclusive* means of seeking relief for claims alleging the violation of rights to special education specifically guaranteed by that statute. *Id.* at 1012-1013, 1019-1021. The Court accordingly rejected the plaintiffs' effort to rely on the Equal Protection Clause and Section 504 as alternative means of vindicating a child's IDEA-protected educational rights. *Ibid.*

Congress overturned *Smith* by enacting the Handicapped Children's Protection Act of 1986 (HCPA), Pub. L. No. 99-372, 100 Stat. 796. Section Three of that statute, 100 Stat. 797—now codified at 20 U.S.C. 1415(*l*)—was intended to "reaffirm * * * the viability of [S]ection 504, 42 U.S.C. 1983, and other statutes as separate vehicles for ensuring the rights of handicapped children." H.R. Rep. No. 296, 99th Cong., 1st Sess. 4 (1985) (House Report) (explaining goal of overruling *Smith*); see *id.* at 6-7 (same); S. Rep. No. 112, 99th Cong., 1st Sess. 2, 15 (1985) (same).

Section 1415(*l*) provides, in relevant part, as follows:

> Nothing in [the IDEA] shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, the [ADA], title V of the Rehabilitation Act of 1973 [including Section 504], or other Federal laws protecting the rights of children with disabilities, except that *before the filing of a civil action under such laws seeking relief that is also available under this subchapter, the*

Charlie F. v. *Board of Educ. of Skokie Sch. Dist. 68*, 98 F.3d 989, 991 (7th Cir. 1996).

> *[administrative] procedures under [the IDEA, 20 U.S.C. 1415(f) and (g)] shall be exhausted to the same extent as would be required had the action been brought under [the IDEA].*

20 U.S.C. 1415(*l*) (emphasis added).

The portion of Section 1415(*l*) italicized above sets forth the circumstances in which a plaintiff bringing suit under the ADA or Section 504 must first exhaust administrative remedies under the IDEA. That exhaustion requirement is the subject of the question presented in this case.

2. E.F. is a child with a severe form of cerebral palsy that substantially limits her motor skills and mobility. Resp. App. 6; Pet. App. 3.[3] In the 2009-2010 school year, E.F. attended kindergarten at Ezra Eby Elementary School (Ezra Eby), which is within the Napoleon Community Schools and Jackson County Intermediate School District (respondents here, along with the principal of Ezra Eby, Pamela Barnes). Resp. App. 5; Pet. App. 4.

In 2009, pursuant to a prescription from E.F.'s doctor, E.F.'s parents and E.F. (collectively, petitioners) obtained Wonder, a trained service dog, to assist E.F. with various functions of ordinary life. Resp. App. 2, 6-7; Pet. App. 3-4. In the fall of 2009 and again in January 2010, respondents informed petitioners that E.F. could not bring Wonder to school. Resp. App. 2, 8; Pet. App. 4. At the time, respondents had a policy that permitted an individual's use of a guide dog in school, but they refused to modify that policy to allow

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[3] The facts discussed in this brief are drawn from petitioners' complaint and the discussion of the complaint in the decisions below.

service animals (like Wonder) more generally. See Resp. App. 3, 9; Pet. App. 27.

In April 2010, respondents permitted E.F. to attend school with Wonder for the remainder of the school year. Resp. App. 8; Pet. App. 4. During that time, however, respondents limited E.F.'s use of Wonder, thereby preventing E.F. from participating in certain school activities. Resp. App. 8-9; Pet. App. 4. At the end of the school year, respondents informed petitioners that they would not allow Wonder to accompany E.F. to school during the 2010-2011 school year. Resp. App. 9; Pet. App. 4.

In response, E.F.'s parents removed E.F. from Ezra Eby and home-schooled her for the 2010-2011 and 2011-2012 school years. Resp. App. 9; Pet. App. 4. E.F.'s parents also filed a complaint with the U.S. Department of Education's Office for Civil Rights (OCR) alleging that respondents had violated Title II and Section 504. Resp. App. 9; Pet. App. 4.

In May 2012, OCR determined that respondents' denial of E.F.'s use of her service dog violated both statutes. J.A. 18-19; Resp. App. 10; Pet. App. 4. In particular, OCR concluded that barring E.F. from using a service animal inappropriately inhibited her independence and thus violated Title II and Section 504's general antidiscrimination requirements. J.A. 35-36. OCR explained that the school's conduct was analogous to "requir[ing] a student who uses a wheelchair to be carried [by school personnel]" or "requir[ing] a blind student to be led through the classroom by holding the arm of his teacher instead of permitting the student to use a service animal or a cane," both of which would likewise "violate the antidiscrimination provisions of Section 504 and Title II." J.A. 35.

In response to OCR's decision, respondents agreed to allow Wonder to accompany E.F. to school. Resp. App. 10; Pet. App. 4. But after E.F.'s father met with Principal Barnes to discuss E.F.'s return to Ezra Eby, her parents developed "serious concerns that the administration would resent [E.F.] and make her return to school difficult." Resp. App. 10. They accordingly found a different public school—in a different district—that welcomed E.F. and Wonder. Resp. App. 10-11; Pet. App. 4. E.F. enrolled in that school the following fall. Resp. App. 10-11.

3. In December 2012, petitioners sued respondents for violating Title II of the ADA and Section 504 of the Rehabilitation Act. Resp. App. 1-22. They alleged that respondents had unlawfully refused to modify their policies to permit E.F. to use her service animal at school between "fall 2009 and spring 2012." Pet. App. 4-5; see Resp. App. 12-19. Petitioners further alleged that E.F. had suffered harm as a result of the discrimination, including "emotional distress and pain, embarrassment, mental anguish, inconvenience, and loss of enjoyment of life." Resp. App. 11-12. In their prayer for relief, petitioners sought a declaration that respondents had violated both statutes, damages to compensate for the harm suffered by E.F., attorneys' fees, and "any other relief [the district] Court deems appropriate." *Id.* at 21. The complaint did not mention the IDEA, allege that E.F. had been denied a FAPE, or seek damages to remedy any violation of that or any other IDEA requirement.

In January 2014, the district court dismissed petitioners' complaint without prejudice under Federal Rule of Civil Procedure 12(c). Pet. App. 37-52. The court held that petitioners had failed to comply with

the IDEA's exhaustion provision, 20 U.S.C. 1415(*l*), insofar as they filed the action without first challenging E.F.'s IEP in accordance with the IDEA's administrative procedures. Pet. App. 5, 42-50.

4. A divided panel of the court of appeals affirmed. Pet. App. 1-20.

a. The panel majority interpreted Section 1415(*l*) to "require[] exhaustion when the injuries alleged can be remedied through IDEA procedures, or when the injuries relate to the specific substantive protections of the IDEA." Pet. App. 6; see *id.* at 3, 10-11 (similar formulations). It explained that petitioners' suit must be dismissed because "[t]he core harms that [petitioners] allege arise from the school's refusal to permit E.F. to attend school with Wonder relate to the specific educational purpose of the IDEA" and because petitioners "could have used IDEA procedures to remedy th[o]se harms." *Id.* at 6; see *id.* at 10-14, 16.

The panel majority acknowledged that petitioners' action sought money damages and that such damages are "unavailable" under the IDEA. Pet. App. 17. It also acknowledged that the IDEA procedures "could *at best* require Ezra Eby Elementary to permit Wonder to accompany E.F. at school," and that such an outcome "would *not* at present be effective in resolving [petitioners'] dispute," both because petitioners no longer sought to enroll E.F. at Ezra Eby and because respondents had already agreed to permit Wonder to accompany E.F. to Ezra Eby following the OCR's 2012 ruling. *Ibid.* (emphases added). The panel majority nonetheless held that the request for money damages "does not in itself excuse the exhaustion requirement," because that would allow plaintiffs to evade that requirement "simply by appending a claim

for damages." *Ibid.* (citation and internal quotation marks omitted).

b. Judge Daughtrey dissented. Pet. App. 21-35. In her view, "[n]on-IDEA claims that do not seek relief available under the IDEA are not subject to the exhaustion requirement, *even if they allege injuries that could conceivably have been redressed by the IDEA.*" *Id.* at 28 (citation omitted; brackets in original).[1]

SUMMARY OF ARGUMENT

Section 1415(*l*) does not require a plaintiff bringing a Title II or Section 504 claim to exhaust the IDEA's administrative process unless that process is capable of providing the plaintiff with the relief that he actually seeks. The decision below should therefore be reversed.

A. Section 1415(*l*) states that a plaintiff bringing a non-IDEA claim is only required to exhaust the IDEA's administrative process if his "civil action" is "seeking relief that is also available under [the IDEA]." 20 U.S.C. 1415(*l*). The statutory language does not require exhaustion when the only relief that the plaintiff requests cannot be awarded—as a matter of law—in IDEA administrative proceedings. Because compensatory damages may not be awarded under the IDEA, exhaustion is not required when a plaintiff seeks only that form of relief.

That interpretation of Section 1415(*l*) is consistent with the ordinary dictionary definitions of the relevant statutory terms, with the Federal Rules of Civil Procedure, and with this Court's analysis of similar language in other contexts. It is also consistent with the Court's especially rigorous enforcement of the text of

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[1] The court of appeals denied rehearing en banc, with Judge Daughtrey dissenting. Pet. App. 53-54.

statutory exhaustion provisions. Just last Term, the Court made clear that when Congress conditions an exhaustion requirement on whether the particular form of relief "sought" by the plaintiff is "offered" by the statute, exhaustion is not required when the plaintiff only seeks relief that is *not* offered. *Ross* v. *Blake*, 136 S. Ct. 1850, 1857 (2016) (citation omitted). That same principle applies here, where Section 1415(*l*) requires exhaustion only if the plaintiff's civil action is "seeking" relief that is "available" under the IDEA.

Other language in Section 1415(*l*) confirms that exhaustion is not required when the plaintiff cannot obtain his desired relief in IDEA proceedings. Section 1415(*l*) requires exhaustion of non-IDEA claims only "to the same extent as would be required" if the claim had been brought under the IDEA. 20 U.S.C. 1415(*l*). But this Court has explained that IDEA claims need not be exhausted when the administrative remedy is "inadequate." *Honig* v. *Doe*, 484 U.S. 305, 326-327 (1988). It has also explained that a form of relief is "inadequate" when the agency "lack[s] authority to grant the type of relief requested." *McCarthy* v. *Madigan*, 503 U.S. 140, 148 (1992). Section 1415(*l*)'s "to the same extent" language thus provides an additional (and overlapping) textual reason that exhaustion is not required when a non-IDEA claim seeks relief that is not available in IDEA proceedings.

The court of appeals held that, even though petitioners sought monetary relief—and even though that relief is "unavailable" under the IDEA—petitioners were required to exhaust. Pet. App. 17. The court reasoned that Section 1415(*l*) requires exhaustion whenever the plaintiff's injuries (1) can be remedied to any extent through IDEA procedures or (2) relate to the

IDEA's substantive protections. *Id.* at 6. That test does not square with the statutory language, which instead requires exhaustion only if the plaintiff "seek[s] relief" that the IDEA makes "available." 20 U.S.C. 1415(*l*). Congress chose its words carefully, and it decided not to adopt a broader exhaustion requirement such as the one endorsed by the court of appeals or set forth in the Prison Litigation Reform Act, 42 U.S.C. 1997e. See 42 U.S.C. 1997e(a) (requiring exhaustion of whatever administrative remedies "are available," regardless of what relief plaintiff actually seeks).

B. Section 1415(*l*)'s legislative history confirms that the statutory text means what it says. The House Report on what is now Section 1415(*l*) makes explicit that exhaustion is not required when "*the [IDEA] hearing officer lacks the authority to grant the relief sought.*" House Report 7 (emphasis added). That rule implements Section 1415(*l*)'s overarching purpose of overturning *Smith* v. *Robinson*, 468 U.S. 992 (1984), and "reaffirm[ing] * * * the viability of" other anti-discrimination provisions as "separate vehicles for ensuring the rights of handicapped children." House Report 4.

C. Section 1415(*l*)'s carefully tailored exhaustion rule reflects a sound policy choice consistent with established exhaustion principles. By declining to require exhaustion when the plaintiff seeks relief that cannot be obtained in IDEA administrative proceedings, Congress allowed parents, school districts, and state educational agencies to avoid a potentially burdensome administrative proceeding that is incapable of resolving the underlying dispute. That choice is consistent with the settled rule—recognized in *McCar-*

thy and other decisions by this Court—that exhaustion is generally not required when the agency lacks authority to provide the plaintiff with the relief that he seeks.

This case illustrates the unsound practical consequences that flow from the court of appeals' flawed interpretation of Section 1415(*l*). Here, (1) petitioners concede that E.F.'s IDEA rights were not violated, (2) E.F. has no ongoing educational relationship with respondents, and (3) petitioners seek only relief that the IDEA does not authorize. Exhaustion makes little sense, because there is no prospect that the IDEA administrative process could ever resolve the parties' dispute.

The court of appeals justified its interpretation almost entirely by reference to policy arguments. But such arguments cannot trump the statutory text, which strikes a balance between Congress's various goals of reaffirming the viability of non-IDEA causes of action, promoting efficiency, and protecting the role of state educational agencies. In any event, the court's policy arguments are overstated: The court's interpretation would appear to require exhaustion even in circumstances where there is no threat to the state educational agency's authority over a child's ongoing educational program and when there is little (if any) prospect that the administrative process would generate a useful record that could assist in subsequent litigation. And the court's fear that plaintiffs will be able to evade the IDEA's administrative process even when they seek relief that *is* available under the IDEA is unfounded.

D. Here, petitioners' Title II and Section 504 claims seek money damages and other forms of relief

that are not available under the IDEA. The court of appeals thus erred in dismissing those claims for failure to exhaust. This Court should accordingly reverse the decision below.

ARGUMENT

THE IDEA DOES NOT REQUIRE ADMINISTRATIVE EXHAUSTION OF NON-IDEA CLAIMS SEEKING ONLY RELIEF THAT IS UNAVAILABLE UNDER THE IDEA

A. Section 1415(*l*)'s Text Establishes That Exhaustion Is Not Required When The Administrative Process Cannot Provide The Requested Relief

The IDEA is not the exclusive mechanism for vindicating the rights of children with disabilities through litigation. Section 1415(*l*) expressly contemplates that aggrieved parties may invoke other statutes—including Title II of the ADA and Section 504 of the Rehabilitation Act—to secure relief for a violation of the substantive standards established in those statutes. 20 U.S.C. 1415(*l*).

Section 1415(*l*) places a single restriction on such non-IDEA litigation: It states that potential litigants must exhaust the IDEA's administrative procedures "before the filing of a *civil action* under [Title II, Section 504, or other specified] laws *seeking relief that is also available* under [the IDEA]." 20 U.S.C. 1415(*l*) (emphasis added). Even then, Section 1415(*l*) requires exhaustion only "*to the same extent* as would be required had the action been brought under [the IDEA]." *Ibid.* (emphasis added). Section 1415(*l*) does not require a plaintiff to exhaust the IDEA's administrative process when that process is incapable of providing the relief that he seeks in a non-IDEA action.

1. Exhaustion is required only if a plaintiff's action "seek[s] relief" that is "available" under the IDEA

By its plain terms, Section 1415(*l*)'s exhaustion requirement applies only to non-IDEA "civil action[s] * * * seeking relief that is also available under [the IDEA]." 20 U.S.C. 1415(*l*). Exhaustion is therefore not required when the civil action in question seeks relief that cannot be obtained under the IDEA's remedial scheme. Because compensatory damages cannot be obtained under the IDEA, a plaintiff who seeks only such damages under a different statute is not required to exhaust that claim.

a. To determine whether any particular "civil action" triggers Section 1415(*l*)'s exhaustion requirement, a court must first determine precisely what "*relief*" that action is "*seeking*." 20 U.S.C. 1415(*l*) (emphases added). In doing so, the court must examine the complaint, with particular emphasis on the specific relief that the plaintiff has asked the court to award.

That straightforward approach follows from the ordinary meaning of the verb "seek," which is "to try to obtain," "to ask for," and "[to] request." *Random House Webster's Unabridged Dictionary* 1733 (2d ed. 2001) (*Random House*); see, *e.g.*, *Webster's Ninth New Collegiate Dictionary* 1063 (1985) ("to ask for," "[to] request," "to try to acquire or gain") (capitalization omitted). The Federal Rules of Civil Procedure establish that the complaint is the formal instrument by which a plaintiff informs the court and the other parties of the relief he is affirmatively seeking. See Fed. R. Civ. P. 8(a)(3) (requiring a complaint to include "a demand for the relief *sought*") (emphasis added); see also Fed. R. Civ. P. 54(c) (discussing the "relief" that a party has "demanded" in its pleadings).

This Court applied a complaint-centered approach to determining whether a civil "action" is "seeking" a particular form of "relief" in *Bowen* v. *Massachusetts*, 487 U.S. 879 (1988). There, the Court had to decide whether a case under the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.*, qualified as an "action * * * seeking relief other than money damages" under the APA's jurisdictional provision, 5 U.S.C. 702. *Bowen*, 487 U.S. at 891-901. In resolving that question, the Court looked to the specific forms of relief requested in the complaint. *Id.* at 893. The Court made clear that this approach followed from the "plain language" of Section 702. *Ibid.*

This Court also treated a plaintiff's complaint as the guide to the particular relief he was "seeking" in *McCarthy* v. *Madigan*, 503 U.S. 140 (1992). There, the Court made clear that a prisoner was "seeking only money damages" because such damages were "the only relief requested by [him] in this action." *Id.* at 152; see *id.* at 142 (noting that complaint stated that "This Complaint seeks Money Damages Only") (citation omitted).

b. Once a court applying Section 1415(*l*) looks to the complaint and identifies the "relief" the "civil action" is "seeking," the court must then determine whether that requested relief is "*available* under [the IDEA]." 20 U.S.C. 1415(*l*) (emphasis added). As this Court has explained, "the ordinary meaning of the word 'available' is 'capable of use for the accomplishment of a purpose, and that which is accessible or may be obtained.'" *Ross* v. *Blake*, 136 S. Ct. 1850, 1858 (2016) (quoting *Booth* v. *Churner*, 532 U.S. 731, 737-738 (2001), and *Webster's Third New International Dictionary* 150 (1993)) (internal quotation marks omit-

ted); see *Random House* 142 (defining "available" as "accessible" or "readily obtainable"). Relief a plaintiff seeks is therefore not "available" to him when the IDEA does not authorize a court or state agency to award that relief in IDEA proceedings.

One circumstance in which the desired relief is plainly *not* available is when it takes the form of a particular remedy that the IDEA does not authorize. Here, the parties agree—correctly—that compensatory damages are not an "available" remedy in IDEA proceedings. Pets. Br. 5, 45; Br. in Opp. 6, 20; see Pet. App. 17. IDEA relief is equitable in nature and does not encompass compensatory damages. See p. 5, *supra* (citing cases); see generally *Florence Cnty. Sch. Dist. Four* v. *Carter*, 510 U.S. 7, 12 (1993) (discussing IDEA's grant of "equitable authority"). When a plaintiff seeks only compensatory damages under a non-IDEA statute, he is therefore not required to exhaust that claim.

Although not directly implicated by petitioners' question presented, relief is also not "available under [the IDEA]" for purposes of Section 1415(*l*) if the plaintiff expressly concedes that the defendant's conduct did not violate the IDEA. IDEA relief is only "available" to plaintiffs who can establish a violation of the IDEA. See 20 U.S.C. 1415(f)(3)(E). In such circumstances, the concession makes clear that there is no dispute that the child at issue received a FAPE, and thus that there is no available remedy under the IDEA. As a result of the concession, the plaintiff can obtain relief on his non-IDEA claim only if that claim relies on substantive rights that exist independent of the IDEA and that offer different protections than those provided by that statute.

By contrast, exhaustion generally *is* required when a plaintiff both (1) seeks a form of relief that is authorized by the IDEA, and (2) does not concede that the school district has complied with the IDEA. In that circumstance, the IDEA administrative process can potentially resolve the parties' dispute.

c. This Court should embrace this straightforward interpretation of Section 1415(*l*)'s unambiguous text. As the Court has often emphasized, "when the statutory language is plain, [courts] must enforce it according to its terms." *Jimenez* v. *Quarterman*, 555 U.S. 113, 118 (2009).

The Court has been especially rigorous in enforcing the plain meaning of statutory exhaustion provisions. "Time and time again, th[e] Court has taken such statutes at face value—refusing to add unwritten limits onto their rigorous textual requirements." *Ross*, 136 S. Ct. at 1857 (citing cases). With respect to such provisions, "Congress sets the rules—and courts have a role in creating exceptions only if Congress wants them to." *Ibid.*; see generally *McNeil* v. *United States*, 508 U.S. 106, 111, 113 (1993) (rejecting atextual interpretation of exhaustion provision and emphasizing that "[w]e are not free to rewrite the statutory text").

Last Term's decision in *Ross* provides the most recent example of this approach. There, the Court enforced the "unambiguous" text of the statutory exhaustion requirement set forth in the PLRA, 42 U.S.C. 1997e(a). 136 S. Ct. at 1856. The Court rejected the Fourth Circuit's creation of an "extra-textual exception" to that requirement and criticized that court for "ma[king] no attempt to ground its analysis in the PLRA's language." *Ibid.* (citation omitted). Notably, the Court emphasized that its strict fidelity to the text

of statutory exhaustion provisions "runs both ways" and applies whether or not it makes it harder or easier for the plaintiff to sue. *Id.* at 1857 n.1. The Court thus stressed the importance of rigorously enforcing an *exception* to exhaustion that Congress had "baked into [the PLRA's] text." *Id.* at 1862. And it reiterated that imposing "extra-statutory limitations on a prisoner's capacity to sue" "exceeds the proper limits on the judicial role." *Id.* at 1857 n.1 (citation omitted).

d. *Ross* is especially significant because the Court carefully distinguished Section 1997e(a)'s exhaustion provision from the sort of exhaustion provision at issue in this case. Section 1997e(a) requires prisoners to exhaust "such administrative remedies as are available" before bringing a civil action challenging prison conditions in court. 42 U.S.C. 1997e(a). The Court explained that in *Booth*, *supra*, the plaintiff had "argued that exhaustion was not necessary [under Section 1997e(a)] because he wanted a type of relief that the administrative process did not provide." 136 S. Ct. at 1857. The Court noted that it had rejected that argument because Section 1997e(a) "made no distinctions based on the particular 'forms of relief *sought* and *offered*,'" and the "legislative judgment must control." *Ibid.* (emphasis added) (quoting *Booth*, 532 U.S. at 741 n.6).

The plain implication of the Court's analysis is that the *Booth* plaintiff would have prevailed—and exhaustion would *not* have been required—if the applicability of Section 1997e(a) *had* turned on the forms of relief "sought and offered." That is precisely the case here: Unlike the PLRA, Section 1415(*l*) only requires exhaustion when the plaintiff is "seeking" relief that is "available" under the IDEA process. As in *Ross* and

Booth, the "legislative judgment must control." *Ross*, 136 S. Ct. at 1857.

2. Section 1415(l)'s "to the same extent" language confirms that exhaustion is not required when the requested relief is not available in the administrative proceeding

The preceding argument rests entirely on Section 1415(*l*)'s statement that the exhaustion requirement applies only to "civil action[s] * * * seeking relief that is also available under [the IDEA]." But the IDEA places an additional limit on the scope of that requirement: It provides that IDEA administrative procedures must be exhausted only "*to the same extent* as would be required had the action been brought under [the IDEA]." 20 U.S.C. 1415(*l*) (emphasis added). That limitation confirms that exhaustion is not required when a plaintiff brings a non-IDEA claim seeking relief that is unavailable in an IDEA administrative proceeding.

To apply Section 1415(*l*)'s "to the same extent" limitation, a court must imagine a hypothetical IDEA action based on the same alleged misconduct and seeking the same relief as the non-IDEA action actually at issue. If the plaintiff in such a hypothetical action would not be required to exhaust the IDEA administrative process, exhaustion of the non-IDEA action is not required either. In that way, Congress made any exceptions to exhaustion for IDEA claims applicable to non-IDEA claims as well.

In *Honig* v. *Doe*, 484 U.S. 305 (1988), this Court interpreted the exhaustion requirement applicable to IDEA claims to incorporate the standard administrative law exceptions for cases in which exhaustion would be "futile" or the relief "inadequate." *Id.* at

326-327 (interpreting provision that is now 20 U.S.C. 1415(i)(2)(A)).[5] By adding the "to the same extent" language to Section 1415(*l*)'s exhaustion requirement for non-IDEA claims, Congress thereby incorporated the "inadequa[cy]" and "futility" exceptions that previously existed for IDEA claims.

In *McCarthy*, this Court explained that the standard exception for cases in which an administrative remedy is "inadequate" applies when the agency "lack[s] authority to grant the type of relief requested." 503 U.S. at 148 (citing cases); see *id.* at 156-157 (Rehnquist, C.J., concurring in the judgment) (agreeing with Court on this point).[6] When combined with *Honig*, that means that in an IDEA action, a plaintiff is not required to exhaust when the administrative agency cannot provide the relief requested. By virtue of Section 1415(*l*)'s "to the same extent" language, the same is also true for non-IDEA actions.

Thus, both halves of the exhaustion provision lead to the same place: First, Congress provided that exhaustion of non-IDEA claims is not required when the plaintiff is "seeking relief" that is not "available" un-

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[5] Section 1415(i)(2)(A) states that "[a]ny party aggrieved" by the final decision made in the IDEA administrative process "shall have the right to bring a civil action with respect to the complaint presented" in that process. 20 U.S.C. 1415(i)(2)(A).

[6] See *McNeese* v. *Board of Educ. for Cmty. Unit Sch. Dist. 187*, 373 U.S. 668, 675, (1963) (holding that students need not file complaint with school superintendent because the "Superintendent himself apparently has no power to order corrective action" except to request the Attorney General to bring suit); *Montana Nat'l Bank of Billings* v. *Yellowstone Cnty.*, 276 U.S. 499, 505 (1928) (holding that taxpayer need not exhaust administrative procedure because decisionmaker was "powerless" to grant the requested refund).

der the IDEA. And then, through Section 1415(*l*)'s "to the same extent" language, Congress made clear that the standard exceptions to exhaustion—including the exception for when the administrative process cannot provide the plaintiff's desired relief—apply to non-IDEA claims. Congress thus doubly ensured that exhaustion is not required when a non-IDEA claim seeks relief that is not available in IDEA proceedings.

3. There is no textual support for the court of appeals' interpretation of Section 1415(l)

a. The court of appeals held that even though petitioners sought compensatory damages—which are not available under the IDEA—they were nonetheless required to exhaust their claims. Pet. App. 6, 17. The court reasoned that Section 1415(*l*) requires exhaustion of the IDEA's administrative process whenever a plaintiff's alleged injuries either (1) "can be remedied" in some fashion "through IDEA procedures," or (2) "relate to the specific substantive protections of the IDEA." *Id.* at 6.

That injury-centered approach is entirely divorced from the text of Section 1415(*l*). That provision does not require exhaustion based on the nature of the injury, but instead on whether the particular "civil action" filed by the plaintiff is "seeking relief" that the IDEA makes "available." 20 U.S.C. 1415(*l*). The court's approach thus directly contravenes the statutory language.

Here, as in *Ross*, the court of appeals "made no attempt to ground its analysis in the [statute's] language." 136 S. Ct. at 1856. Instead, the court relied almost exclusively on policy considerations. The court considerably overstated the benefits of exhaustion when a plaintiff seeks relief that is not available under

the IDEA. See pp. 29-31, *infra*. But whatever those benefits may be, they do not justify a departure from the statute's text. Imposing "extra-statutory limitations on a [plaintiff's] capacity to sue" "exceeds the proper limits on the judicial role." *Ross*, 136 S. Ct. at 1857 n.1 (citation omitted).

b. Respondents rely (Supp. Br. in Opp. 6, 8) on the textual analysis of the Seventh Circuit in *Charlie F* v. *Board of Education of Skokie School District 68*, 98 F.3d 989 (1996). There, the court held that Section 1415(*l*) required exhaustion of the plaintiff's non-IDEA claims seeking only compensatory damages—a remedy that the court recognized was not available under the IDEA. *Id.* at 991-993. The court reasoned that Section 1415(*l*) "speaks of available relief, and what relief is 'available' does not necessarily depend on what the aggrieved party wants." *Id.* at 991; see *id.* at 992 (citing Fed. R. Civ. P. 54(c)). The Seventh Circuit explained that Section 1415(*l*)'s phrase "*relief available*" means "relief for the events, condition, or consequences of which the person complains, not necessarily relief of the kind the person prefers." *Id.* at 992 (emphasis added). The court ultimately concluded that exhaustion is required so long as there is "relief available" under the IDEA.

The Seventh Circuit's interpretation of the two-word phrase "relief available" is correct—but it does not support that court's conclusion that exhaustion is required whenever the IDEA potentially offers the plaintiff any form of relief. Crucially, Section 1415(*l*) does not state that exhaustion is required whenever there is "relief available" under the IDEA. That approach—which Congress essentially incorporated into the PLRA, 42 U.S.C. 1997e(a)—would require exhaus-

tion if any form of administrative relief is available, even when the plaintiff specifically requests only relief that is *not* available.

Section 1415(*l*) is quite different: It conditions the exhaustion requirement on whether the plaintiff's "*civil action*" is "*seeking*" the available relief. 20 U.S.C. 1415(*l*) (emphasis added). By its terms, the applicability of the exhaustion provision turns on what the plaintiff actually requests, not on what he may be entitled to (but does not request). The Seventh Circuit's approach ignores the word "seeking" and thus contradicts the express statutory text.[7]

B. Section 1415(*l*)'s History And Purpose Reinforce The Plain Meaning Of Its Text

The legislative history and purpose of Section 1415(*l*) confirm that Congress did not intend to require exhaustion of non-IDEA claims seeking relief that cannot be awarded in IDEA proceedings.

1. Beyond the statutory text itself, the clearest indication of Congress's understanding of Section 1415(*l*) appears in the House Report on the HCPA. See House Report 7. That Report explained that the proposed statutory language that eventually became Section 1415(*l*) requires exhaustion of non-IDEA claims

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[7] The Seventh Circuit's reliance on Rule 54(c) is also misplaced. If anything, Rule 54(c) supports the plain-text interpretation of the statute by making clear that the relief the plaintiff seeks in the complaint may differ from the relief to which he is theoretically entitled under the statute. See Fed. R. Civ. P. 54(c) ("Every other final judgment should grant the relief to which each party is entitled, *even if the party has not demanded that relief in its pleadings*.") (emphasis added). Section 1415(*l*) is concerned only with the availability of the relief that the plaintiff is "seeking"—*i.e.*, the relief he "demand[s]."

in circumstances "where exhaustion would be required under [the IDEA] and the relief [the plaintiffs] seek is also available under [the IDEA]." *Ibid.* It then stated that exhaustion would not be required when "*the hearing officer lacks the authority to grant the relief sought.*" *Ibid.* (emphasis added). The House Report thus confirms that a plaintiff is not required to exhaust the IDEA administrative process if he seeks relief that cannot be awarded in that process.

2. The interpretation of Section 1415(*l*) set forth above also faithfully implements the broad purpose of that provision. The text and legislative history make clear that Congress enacted Section 1415(*l*) in order to overturn *Smith* v. *Robinson*, 468 U.S. 992 (1984), and "reaffirm * * * the viability of" other antidiscrimination provisions as "*separate* vehicles for ensuring the rights of handicapped children." House Report 4 (emphasis added); see 20 U.S.C. 1415(*l*) ("Nothing in [the IDEA] shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, the [ADA], title V of the Rehabilitation Act of 1973 [including Section 504], or other Federal laws protecting the rights of children with disabilities, except"); see pp. 6-7, *supra*.

Smith had held that the IDEA's predecessor was the *exclusive* means of seeking relief for claims alleging the violation of rights to special education specifically guaranteed by that statute. 468 U.S. at 1012-1013, 1019-1021. By overruling *Smith*, Congress allowed plaintiffs to proceed under the ADA and Section 504—and to pursue the damages remedies that are available under those statutes—even though a damages remedy is not available under the IDEA. By requiring exhaustion only when the plaintiff's non-

IDEA action is "seeking relief" that is "available" under the IDEA, Congress gave plaintiffs the option to go directly to court if all they seek are damages under other statutes.

The exhaustion requirement confirms the "viability" of other statutes as "separate vehicles" for promoting the rights of children with disabilities by ensuring that if a plaintiff does not seek IDEA relief, he may immediately invoke other freestanding federal causes of action that likewise protect the rights of children with disabilities. Section 1415(*l*)'s text thus squarely aligns with Congress's stated objective.

C. Section 1415(*l*) Reflects A Sound Policy Choice Consistent With Established Exhaustion Principles

1. Congress's decision not to require exhaustion of the IDEA administrative process when that process cannot provide the desired relief makes sense. If the plaintiff seeks only relief that the IDEA is not capable of providing him, requiring exhaustion would force the plaintiff (and school district) to participate in a time-consuming, adversarial, and potentially costly due process hearing that will likely create unnecessary administrative burdens for all involved. The plaintiff would inevitably fail to obtain the relief he actually seeks. Only then would the plaintiff finally be permitted to file the non-IDEA claim that he wanted to bring all along—at which point the parties would begin wrangling anew over the legal questions that actually matter.

Congress quite reasonably chose not to require parents, school districts, and state educational officials to engage in a potentially burdensome administrative process that is incapable of resolving the actual dispute at hand. That policy judgment tracks common-sense principles embodied in this Court's administrative-

exhaustion cases more generally. As explained above, this Court has recognized that an administrative process is "inadequate" when the agency lacks authority to grant the relief that the plaintiff requests. *McCarthy*, 503 U.S. at 147; see *McNeese* v. *Board of Educ. for Cmty. Unit Sch. Dist. 187*, 373 U.S. 668, 675 (1963); *Montana Nat'l Bank of Billings* v. *Yellowstone Cnty.*, 276 U.S. 499, 505 (1928).

2. This case illustrates the inefficient and illogical results that can flow from requiring exhaustion when the relief requested is not available in the administrative process. At the time petitioners filed this action, respondents had already agreed to allow Wonder to accompany E.F. to Ezra Eby for the 2012-2013 school year, and petitioners had already decided to enroll E.F. in a different school in a different district. See p. 9, *supra*. Respondents were no longer providing E.F. with an education, and petitioners did not request compensatory special education or related services. There was therefore no live dispute between the parties as to the content of E.F.'s IEP. Indeed, petitioners have made clear that they believe that E.F. received a FAPE and that respondents did not violate the IDEA. Pets. Br. 19, 44, 47.

In these circumstances, it makes little sense to require petitioners to engage in the IDEA administrative process before suing respondents. After all, there is no alleged IDEA violation for the hearing officer to adjudicate. The purpose of the IDEA administrative process is to resolve disputes over a child's ongoing educational program under the IDEA, not to adjudicate whether a school violated Title II and Section 504 at some time in the past.

Given that respondents had already agreed to allow Wonder to accompany E.F. to school—and that petitioners did not seek any further education-related services from respondents—there was no need for the IDEA process to consider whether Wonder should be part of E.F.'s IEP or whether forbidding Wonder from accompanying E.F. would deny her a FAPE. Even if petitioners had participated in the IDEA administrative process—and had prevailed on every issue—petitioners would have had to file exactly the same suit under Title II and Section 504 in order to obtain their desired relief. See Pet. App. 17 (acknowledging this point). Requiring petitioners and respondents to engage in the IDEA process as a precondition for litigating their Title II and Section 504 claims in court would waste time and resources without offering any chance of resolving their actual dispute.

3. The court of appeals concluded that requiring exhaustion furthers the goals of (1) "preserv[ing] the primacy the IDEA gives to the expertise of state and local agencies" in determining whether a child has been denied a FAPE under the IDEA, and (2) developing a record that includes "expert factfinding" and can inform any subsequent litigation in court. Pet. App. 8-10; see *id.* at 10-14. That analysis not only ignores the substantial costs of requiring exhaustion when the relief sought is not available in the administrative proceeding, it also overstates the benefits of exhaustion.

a. In cases in which the plaintiff concedes there is no violation of the FAPE requirement, exhaustion would do nothing to "preserve the primacy the IDEA gives to the expertise of state and local agencies," Pet. App. 9-10, because that primacy extends only to the adjudi-

cation of IDEA claims. Congress obviously did not intend the IDEA to establish state and local primacy over non-IDEA claims that do not turn on an adjudication of the IDEA's substantive legal standards. Nor would requiring exhaustion in such cases likely provide district courts with expert factfinding or a detailed administrative record. If the plaintiff concedes there is no IDEA violation, it is not clear why the state hearing officer would need to go through the burden and expense of developing any sort of detailed record at all; he could simply deny relief. See 20 U.S.C. 1415(f)(3)(E). Requiring exhaustion in such cases would be pointless.

b. In cases where the plaintiff seeks only money damages or other relief that is not available in IDEA proceedings, the benefits of exhaustion are uncertain. In such cases, the state hearing officer could choose to reject the plaintiff's request for that relief without developing a substantive record at all.

Even if a record were developed, it would be of limited value in a subsequent non-IDEA action. To be sure, the facts relevant to an IDEA claim will sometimes overlap with those relevant to a Title II or Section 504 claim, and in theory there could be some utility in having a state hearing officer consider those facts in the first instance, even if the officer were powerless to award the desired relief. But the chief purpose of IDEA proceedings is to determine whether a plaintiff is entitled to relief *under the IDEA*.[8] Any

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[8] See, *e.g.*, 20 U.S.C. 1415(b)(6) (envisioning that due-process complaint will set forth a "violation" of IDEA); 20 U.S.C. 1415(f)(3)(A)(ii) (requiring hearing officer to "possess knowledge of, and the ability to understand," IDEA and implementing regulations, without requiring similar knowledge or understanding

record in such proceedings would therefore principally focus on whether or not the plaintiff has established a violation of the IDEA, not on whether other statutes were violated.

Moreover, whereas Congress required courts hearing IDEA cases to receive the IDEA administrative record and to give "due weight" to its factual findings, it made no similar provision for non-IDEA cases. *Board of Educ. of the Hendrick Hudson Cent. Sch. Dist.* v. *Rowley*, 458 U.S. 176, 206 (1982); see 20 U.S.C. 1415(i)(2)(C)(i). It thus does not appear that Congress viewed the development of an IDEA administrative record as being particularly important or useful in non-IDEA cases. Nothing in Section 1415(*l*)'s text or history suggests that Congress wanted to require exhaustion of any non-IDEA claim in which the agency's factfinding could potentially facilitate the subsequent adjudication of that claim in court.

c. In any event, it is up to Congress—not the courts—to make policy based on the perceived costs and benefits of requiring exhaustion when the relief requested is not available in IDEA administrative proceedings. And Congress concluded that the costs outweighed any potential benefits. The court of appeals had no authority to strike a different balance. *Florida Dep't. of Revenue* v. *Piccadilly Cafeterias, Inc.*, 554 U.S. 33, 52 (2008) (A court may not "substitute [its] view of . . . policy for the legislation which has been passed by Congress.").

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of ADA, Rehabilitation Act, or other statutes); 20 U.S.C. 1415(f)(3)(E)(i) (stating that "a decision made by a hearing officer shall be made on substantive grounds based on a determination of whether the child received a [FAPE]").

4. In addition to its other policy arguments, the court of appeals warned that interpreting Section 1415(*l*)'s exhaustion requirement to turn on the relief actually sought would allow plaintiffs to "evade the exhaustion requirement simply by appending a claim for damages." Pet. App. 17 (citation and internal quotation marks omitted). That concern is unfounded.

Under Section 1415(*l*)'s plain language, a plaintiff who seeks relief that *is* available under the IDEA cannot avoid exhaustion simply by tacking on a request for damages. The exhaustion requirement unambiguously applies to any request for relief that is available under the IDEA, and the court would therefore dismiss any such request, while retaining jurisdiction only over the request for money damages.[9] In appropriate cases, the district court would also have discretion to defer consideration of the claim for money damages until exhaustion on the dismissed claims has been completed. See generally, *e.g.*, *Clinton* v. *Jones*, 520 U.S. 681, 706 (1997) ("The District Court has broad discretion to stay proceedings as an incident to its power to control its own docket.").

The only plaintiffs who will be able to bypass the IDEA administrative process by filing a non-IDEA claim are thus those who are willing to forego any effort to obtain relief that is potentially available to them under the IDEA. As a practical matter, the

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[9] See, *e.g.*, *Jones* v. *Bock*, 549 U.S. 199, 219-224 (2007) (permitting dismissal of unexhausted claims and stating that when exhaustion is required before filing a civil "action," it means that "if a complaint contains both good and bad claims, the court proceeds with the good and leaves the bad"); *Cassidy* v. *Indiana Dep't of Corr.*, 199 F.3d 374, 376-377 (7th Cir. 2000) (affirming dismissal of one aspect of relief sought by plaintiff).

plaintiffs who are likely to make that choice are those who either (1) do not believe that the IDEA was violated, (2) have already reached a resolution with the school providing them with whatever IDEA relief they may be entitled to receive, or (3) no longer seek IDEA services from the school district for the child at issue. Those are precisely the plaintiffs who should not be forced to exhaust a potentially burdensome, adversarial administrative process as a prerequisite to filing an inevitable civil action in court.

D. Petitioners' Title II And Section 504 Claims Are Not Subject To Exhaustion

Petitioners do not seek relief that is available under the IDEA's administrative process. As a result, their claims do not trigger Section 1415(*l*)'s exhaustion requirement. This Court should accordingly reverse the decision below.

The "REQUEST FOR RELIEF" set forth in petitioners' complaint asks the court to (1) "[e]nter judgment" in petitioners' favor as to both its Title II and its Section 504 claims; (2) "[i]ssue a declaration" stating that respondents violated E.F.'s rights under Title II and Section 504; (3) "[a]ward [E.F.] damages in an amount to be determined at trial"; (4) "[a]ward attorneys' fees pursuant to" the ADA, Rehabilitation Act, and 42 U.S.C. 1988; and (5) "[g]rant any other relief this [c]ourt deems appropriate." Resp. App. 21.

None of those forms of relief is "available under [the IDEA]." 20 U.S.C. 1415(*l*). The IDEA does not entitle a plaintiff to obtain a judgment or declaratory relief stating that the defendant violated the ADA or Section 504, and petitioners have expressly conceded that their IDEA rights were not violated. Pets. Br. 19. Nor does the IDEA entitle a prevailing plaintiff to

obtain money damages to compensate for harms suffered as a result of a violation of its substantive standards. See p. 5, *supra*. And although the IDEA authorizes an award of attorneys' fees, it does so only when the plaintiff has prevailed in an *IDEA* action. See 20 U.S.C. 1415(i)(3)(B). Here, petitioners' request for attorneys' fees is ancillary to their request for declaratory relief and money damages under Title II and Section 504, and they cannot prevail on those requests in IDEA proceedings.

The complaint's boilerplate request for "any other relief this [c]ourt deems appropriate," Resp. App. 21, cannot reasonably be construed as seeking relief available under the IDEA. The complaint makes clear that E.F. has successfully integrated into a new school outside respondents' district, and it does not demand that respondents provide future educational services, reimbursement for past educational expenses, or any other form of equitable relief available in IDEA proceedings. See *id.* at 10-12, 21; see generally pp. 9-10, *supra*.

In short, the various forms of relief that plaintiffs request are all unavailable in IDEA proceedings. Because it is plain that IDEA proceedings could not have provided them with the relief they are seeking, their Title II and Section 504 claims are not subject to exhaustion under Section 1415(*l*). The court of appeals erred in concluding otherwise.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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AUGUST 2016

APPENDIX

1. 20 U.S.C. 1400(d) provides:

Short title; findings; purposes

(d) Purposes

The purposes of this chapter are—

(1)(A) to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living;

(B) to ensure that the rights of children with disabilities and parents of such children are protected; and

(C) to assist States, localities, educational service agencies, and Federal agencies to provide for the education of all children with disabilities;

(2) to assist States in the implementation of a statewide, comprehensive, coordinated, multidisciplinary, interagency system of early intervention services for infants and toddlers with disabilities and their families;

(3) to ensure that educators and parents have the necessary tools to improve educational results for children with disabilities by supporting system improvement activities; coordinated research and personnel preparation; coordinated technical assistance, dissemination, and support; and technology development and media services; and

(4) to assess, and ensure the effectiveness of, efforts to educate children with disabilities.

2. 20 U.S.C. 1412 provides in pertinent part:

State eligibility

(a) In general

A State is eligible for assistance under this subchapter for a fiscal year if the State submits a plan that provides assurances to the Secretary that the State has in effect policies and procedures to ensure that the State meets each of the following conditions:

* * * * *

(4) Individualized education program

An individualized education program, or an individualized family service plan that meets the requirements of section 1436(d) of this title, is developed, reviewed, and revised for each child with a disability in accordance with section 1414(d) of this title.

* * * * *

(6) Procedural safeguards

(A) In general

Children with disabilities and their parents are afforded the procedural safeguards required by section 1415 of this title.

(B) Additional procedural safeguards

Procedures to ensure that testing and evaluation materials and procedures utilized for the purposes of evaluation and placement of children with

disabilities for services under this chapter will be selected and administered so as not to be racially or culturally discriminatory. Such materials or procedures shall be provided and administered in the child's native language or mode of communication, unless it clearly is not feasible to do so, and no single procedure shall be the sole criterion for determining an appropriate educational program for a child.

* * * * *

(10) Children in private schools

(A) Children enrolled in private schools by their parents

(i) In general

To the extent consistent with the number and location of children with disabilities in the State who are enrolled by their parents in private elementary schools and secondary schools in the school district served by a local educational agency, provision is made for the participation of those children in the program assisted or carried out under this subchapter by providing for such children special education and related services in accordance with the following requirements, unless the Secretary has arranged for services to those children under subsection (f):

(I) Amounts to be expended for the provision of those services (including direct services to parentally placed private school children) by the local educational agency shall be equal to a proportionate amount of

Federal funds made available under this subchapter.

(II) In calculating the proportionate amount of Federal funds, the local educational agency, after timely and meaningful consultation with representatives of private schools as described in clause (iii), shall conduct a thorough and complete child find process to determine the number of parentally placed children with disabilities attending private schools located in the local educational agency.

(III) Such services to parentally placed private school children with disabilities may be provided to the children on the premises of private, including religious, schools, to the extent consistent with law.

(IV) State and local funds may supplement and in no case shall supplant the proportionate amount of Federal funds required to be expended under this subparagraph.

(V) Each local educational agency shall maintain in its records and provide to the State educational agency the number of children evaluated under this subparagraph, the number of children determined to be children with disabilities under this paragraph, and the number of children served under this paragraph.

(ii) Child find requirement

(I) In general

The requirements of paragraph (3) (relating to child find) shall apply with respect to children with disabilities in the State who are enrolled in private, including religious, elementary schools and secondary schools.

(II) Equitable participation

The child find process shall be designed to ensure the equitable participation of parentally placed private school children with disabilities and an accurate count of such children.

(III) Activities

In carrying out this clause, the local educational agency, or where applicable, the State educational agency, shall undertake activities similar to those activities undertaken for the agency's public school children.

(IV) Cost

The cost of carrying out this clause, including individual evaluations, may not be considered in determining whether a local educational agency has met its obligations under clause (i).

(V) Completion period

Such child find process shall be completed in a time period comparable to that for other students attending public schools in the local educational agency.

(iii) Consultation

To ensure timely and meaningful consultation, a local educational agency, or where appropriate, a State educational agency, shall consult with private school representatives and representatives of parents of parentally placed private school children with disabilities during the design and development of special education and related services for the children, including regarding—

(I) the child find process and how parentally placed private school children suspected of having a disability can participate equitably, including how parents, teachers, and private school officials will be informed of the process;

(II) the determination of the proportionate amount of Federal funds available to serve parentally placed private school children with disabilities under this subparagraph, including the determination of how the amount was calculated;

(III) the consultation process among the local educational agency, private school officials, and representatives of parents of parentally placed private school children with disabilities, including how such process will operate throughout the school year to ensure that parentally placed private school children with disabilities identified through the child find process can meaningfully par-

ticipate in special education and related services;

(IV) how, where, and by whom special education and related services will be provided for parentally placed private school children with disabilities, including a discussion of types of services, including direct services and alternate service delivery mechanisms, how such services will be apportioned if funds are insufficient to serve all children, and how and when these decisions will be made; and

(V) how, if the local educational agency disagrees with the views of the private school officials on the provision of services or the types of services, whether provided directly or through a contract, the local educational agency shall provide to the private school officials a written explanation of the reasons why the local educational agency chose not to provide services directly or through a contract.

(iv) Written affirmation

When timely and meaningful consultation as required by clause (iii) has occurred, the local educational agency shall obtain a written affirmation signed by the representatives of participating private schools, and if such representatives do not provide such affirmation within a reasonable period of time, the local educational agency shall forward the documentation of the

consultation process to the State educational agency.

(v) Compliance

(I) In general

A private school official shall have the right to submit a complaint to the State educational agency that the local educational agency did not engage in consultation that was meaningful and timely, or did not give due consideration to the views of the private school official.

(II) Procedure

If the private school official wishes to submit a complaint, the official shall provide the basis of the noncompliance with this subparagraph by the local educational agency to the State educational agency, and the local educational agency shall forward the appropriate documentation to the State educational agency. If the private school official is dissatisfied with the decision of the State educational agency, such official may submit a complaint to the Secretary by providing the basis of the noncompliance with this subparagraph by the local educational agency to the Secretary, and the State educational agency shall forward the appropriate documentation to the Secretary.

(vi) Provision of equitable services

(I) Directly or through contracts

The provision of services pursuant to this subparagraph shall be provided—

(aa) by employees of a public agency; or

(bb) through contract by the public agency with an individual, association, agency, organization, or other entity.

(II) Secular, neutral, nonideological

Special education and related services provided to parentally placed private school children with disabilities, including materials and equipment, shall be secular, neutral, and nonideological.

(vii) Public control of funds

The control of funds used to provide special education and related services under this subparagraph, and title to materials, equipment, and property purchased with those funds, shall be in a public agency for the uses and purposes provided in this chapter, and a public agency shall administer the funds and property.

(B) Children placed in, or referred to, private schools by public agencies

(i) In general

Children with disabilities in private schools and facilities are provided special ed-

ucation and related services, in accordance with an individualized education program, at no cost to their parents, if such children are placed in, or referred to, such schools or facilities by the State or appropriate local educational agency as the means of carrying out the requirements of this subchapter or any other applicable law requiring the provision of special education and related services to all children with disabilities within such State.

(ii) Standards

In all cases described in clause (i), the State educational agency shall determine whether such schools and facilities meet standards that apply to State educational agencies and local educational agencies and that children so served have all the rights the children would have if served by such agencies.

(C) Payment for education of children enrolled in private schools without consent of or referral by the public agency

(i) In general

Subject to subparagraph (A), this subchapter does not require a local educational agency to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if that agency made a free appropriate public education available to the child and the parents elected to place the child in such private school or facility.

(ii) Reimbursement for private school placement

If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private elementary school or secondary school without the consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made a free appropriate public education available to the child in a timely manner prior to that enrollment.

(iii) Limitation on reimbursement

The cost of reimbursement described in clause (ii) may be reduced or denied—

(I) if—

(aa) at the most recent IEP meeting that the parents attended prior to removal of the child from the public school, the parents did not inform the IEP Team that they were rejecting the placement proposed by the public agency to provide a free appropriate public education to their child, including stating their concerns and their intent to enroll their child in a private school at public expense; or

(bb) 10 business days (including any holidays that occur on a business

day) prior to the removal of the child from the public school, the parents did not give written notice to the public agency of the information described in item (aa);

(II) if, prior to the parents' removal of the child from the public school, the public agency informed the parents, through the notice requirements described in section 1415(b)(3) of this title, of its intent to evaluate the child (including a statement of the purpose of the evaluation that was appropriate and reasonable), but the parents did not make the child available for such evaluation; or

(III) upon a judicial finding of unreasonableness with respect to actions taken by the parents.

(iv) Exception

Notwithstanding the notice requirement in clause (iii)(I), the cost of reimbursement—

(I) shall not be reduced or denied for failure to provide such notice if—

(aa) the school prevented the parent from providing such notice;

(bb) the parents had not received notice, pursuant to section 1415 of this title, of the notice requirement in clause (iii)(I); or

(cc) compliance with clause (iii)(I) would likely result in physical harm to the child; and

(II) may, in the discretion of a court or a hearing officer, not be reduced or denied for failure to provide such notice if—

(aa) the parent is illiterate or cannot write in English; or

(bb) compliance with clause (iii)(I) would likely result in serious emotional harm to the child.

* * * * *

3. 20 U.S.C. 1414 provides:

Evaluations, eligibility determinations, individualized education programs, and educational placements

(a) Evaluations, parental consent, and reevaluations

(1) Initial evaluations

(A) In general

A State educational agency, other State agency, or local educational agency shall conduct a full and individual initial evaluation in accordance with this paragraph and subsection (b), before the initial provision of special education and related services to a child with a disability under this subchapter.

(B) Request for initial evaluation

Consistent with subparagraph (D), either a parent of a child, or a State educational agency, other State agency, or local educational agency may initiate a request for an initial evaluation to determine if the child is a child with a disability.

(C) Procedures

(i) In general

Such initial evaluation shall consist of procedures—

(I) to determine whether a child is a child with a disability (as defined in section 1401 of this title) within 60 days of receiving parental consent for the evaluation, or, if the State establishes a timeframe within which the evaluation must be conducted, within such timeframe; and

(II) to determine the educational needs of such child.

(ii) Exception

The relevant timeframe in clause (i)(I) shall not apply to a local educational agency if—

(I) a child enrolls in a school served by the local educational agency after the relevant timeframe in clause (i)(I) has begun and prior to a determination by the child's previous local educational agency as to whether the child is a child with a disability (as defined in section 1401 of

this title), but only if the subsequent local educational agency is making sufficient progress to ensure a prompt completion of the evaluation, and the parent and subsequent local educational agency agree to a specific time when the evaluation will be completed; or

(II) the parent of a child repeatedly fails or refuses to produce the child for the evaluation.

(D) Parental consent

(i) In general

(I) Consent for initial evaluation

The agency proposing to conduct an initial evaluation to determine if the child qualifies as a child with a disability as defined in section 1401 of this title shall obtain informed consent from the parent of such child before conducting the evaluation. Parental consent for evaluation shall not be construed as consent for placement for receipt of special education and related services.

(II) Consent for services

An agency that is responsible for making a free appropriate public education available to a child with a disability under this subchapter shall seek to obtain informed consent from the parent of such child before providing special education and related services to the child.

(ii) Absence of consent

(I) For initial evaluation

If the parent of such child does not provide consent for an initial evaluation under clause (i)(I), or the parent fails to respond to a request to provide the consent, the local educational agency may pursue the initial evaluation of the child by utilizing the procedures described in section 1415 of this title, except to the extent inconsistent with State law relating to such parental consent.

(II) For services

If the parent of such child refuses to consent to services under clause (i)(II), the local educational agency shall not provide special education and related services to the child by utilizing the procedures described in section 1415 of this title.

(III) Effect on agency obligations

If the parent of such child refuses to consent to the receipt of special education and related services, or the parent fails to respond to a request to provide such consent—

(aa) the local educational agency shall not be considered to be in violation of the requirement to make available a free appropriate public education to the child for the failure to provide such child with the special educa-

tion and related services for which the local educational agency requests such consent; and

(bb) the local educational agency shall not be required to convene an IEP meeting or develop an IEP under this section for the child for the special education and related services for which the local educational agency requests such consent.

(iii) Consent for wards of the State

(I) In general

If the child is a ward of the State and is not residing with the child's parent, the agency shall make reasonable efforts to obtain the informed consent from the parent (as defined in section 1401 of this title) of the child for an initial evaluation to determine whether the child is a child with a disability.

(II) Exception

The agency shall not be required to obtain informed consent from the parent of a child for an initial evaluation to determine whether the child is a child with a disability if—

(aa) despite reasonable efforts to do so, the agency cannot discover the whereabouts of the parent of the child;

(bb) the rights of the parents of the child have been terminated in accordance with State law; or

(cc) the rights of the parent to make educational decisions have been subrogated by a judge in accordance with State law and consent for an initial evaluation has been given by an individual appointed by the judge to represent the child.

(E) Rule of construction

The screening of a student by a teacher or specialist to determine appropriate instructional strategies for curriculum implementation shall not be considered to be an evaluation for eligibility for special education and related services.

(2) Reevaluations

(A) In general

A local educational agency shall ensure that a reevaluation of each child with a disability is conducted in accordance with subsections (b) and (c)—

(i) if the local educational agency determines that the educational or related services needs, including improved academic achievement and functional performance, of the child warrant a reevaluation; or

(ii) if the child's parents or teacher requests a reevaluation.

(B) Limitation

A reevaluation conducted under subparagraph (A) shall occur—

(i) not more frequently than once a year, unless the parent and the local educational agency agree otherwise; and

(ii) at least once every 3 years, unless the parent and the local educational agency agree that a reevaluation is unnecessary.

(b) Evaluation procedures

(1) Notice

The local educational agency shall provide notice to the parents of a child with a disability, in accordance with subsections (b)(3), (b)(4), and (c) of section 1415 of this title, that describes any evaluation procedures such agency proposes to conduct.

(2) Conduct of evaluation

In conducting the evaluation, the local educational agency shall—

(A) use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parent, that may assist in determining—

(i) whether the child is a child with a disability; and

(ii) the content of the child's individualized education program, including information related to enabling the child to be involved in and progress in the general education curric-

ulum, or, for preschool children, to participate in appropriate activities;

(B) not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability or determining an appropriate educational program for the child; and

(C) use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors.

(3) **Additional requirements**

Each local educational agency shall ensure that—

(A) assessments and other evaluation materials used to assess a child under this section—

(i) are selected and administered so as not to be discriminatory on a racial or cultural basis;

(ii) are provided and administered in the language and form most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally, unless it is not feasible to so provide or administer;

(iii) are used for purposes for which the assessments or measures are valid and reliable;

(iv) are administered by trained and knowledgeable personnel; and

(v) are administered in accordance with any instructions provided by the producer of such assessments;

(B) the child is assessed in all areas of suspected disability;

(C) assessment tools and strategies that provide relevant information that directly assists persons in determining the educational needs of the child are provided; and

(D) assessments of children with disabilities who transfer from 1 school district to another school district in the same academic year are coordinated with such children's prior and subsequent schools, as necessary and as expeditiously as possible, to ensure prompt completion of full evaluations.

(4) **Determination of eligibility and educational need**

Upon completion of the administration of assessments and other evaluation measures—

(A) the determination of whether the child is a child with a disability as defined in section 1401(3) of this title and the educational needs of the child shall be made by a team of qualified professionals and the parent of the child in accordance with paragraph (5); and

(B) a copy of the evaluation report and the documentation of determination of eligibility shall be given to the parent.

(5) Special rule for eligibility determination

In making a determination of eligibility under paragraph (4)(A), a child shall not be determined to be a child with a disability if the determinant factor for such determination is—

(A) lack of appropriate instruction in reading, including in the essential components of reading instruction (as defined in section 6368(3) of this title);

(B) lack of instruction in math; or

(C) limited English proficiency.

(6) Specific learning disabilities

(A) In general

Notwithstanding section 1406(b) of this title, when determining whether a child has a specific learning disability as defined in section 1401 of this title, a local educational agency shall not be required to take into consideration whether a child has a severe discrepancy between achievement and intellectual ability in oral expression, listening comprehension, written expression, basic reading skill, reading comprehension, mathematical calculation, or mathematical reasoning.

(B) Additional authority

In determining whether a child has a specific learning disability, a local educational agency may use a process that determines if the child responds to scientific, research-based interven-

tion as a part of the evaluation procedures described in paragraphs (2) and (3).

(c) Additional requirements for evaluation and reevaluations

(1) Review of existing evaluation data

As part of an initial evaluation (if appropriate) and as part of any reevaluation under this section, the IEP Team and other qualified professionals, as appropriate, shall—

(A) review existing evaluation data on the child, including—

(i) evaluations and information provided by the parents of the child;

(ii) current classroom-based, local, or State assessments, and classroom-based observations; and

(iii) observations by teachers and related services providers; and

(B) on the basis of that review, and input from the child's parents, identify what additional data, if any, are needed to determine—

(i) whether the child is a child with a disability as defined in section 1401(3) of this title, and the educational needs of the child, or, in case of a reevaluation of a child, whether the child continues to have such a disability and such educational needs;

(ii) the present levels of academic achievement and related developmental needs of the child;

(iii) whether the child needs special education and related services, or in the case of a reevaluation of a child, whether the child continues to need special education and related services; and

(iv) whether any additions or modifications to the special education and related services are needed to enable the child to meet the measurable annual goals set out in the individualized education program of the child and to participate, as appropriate, in the general education curriculum.

(2) Source of data

The local educational agency shall administer such assessments and other evaluation measures as may be needed to produce the data identified by the IEP Team under paragraph (1)(B).

(3) Parental consent

Each local educational agency shall obtain informed parental consent, in accordance with subsection (a)(1)(D), prior to conducting any reevaluation of a child with a disability, except that such informed parental consent need not be obtained if the local educational agency can demonstrate that it had taken

reasonable measures to obtain such consent and the child's parent has failed to respond.

(4) Requirements if additional data are not needed

If the IEP Team and other qualified professionals, as appropriate, determine that no additional data are needed to determine whether the child continues to be a child with a disability and to determine the child's educational needs, the local educational agency—

(A) shall notify the child's parents of—

(i) that determination and the reasons for the determination; and

(ii) the right of such parents to request an assessment to determine whether the child continues to be a child with a disability and to determine the child's educational needs; and

(B) shall not be required to conduct such an assessment unless requested to by the child's parents.

(5) Evaluations before change in eligibility

(A) In general

Except as provided in subparagraph (B), a local educational agency shall evaluate a child with a disability in accordance with this section before determining that the child is no longer a child with a disability.

(B) Exception

(i) In general

The evaluation described in subparagraph (A) shall not be required before the termination of a child's eligibility under this subchapter due to graduation from secondary school with a regular diploma, or due to exceeding the age eligibility for a free appropriate public education under State law.

(ii) Summary of performance

For a child whose eligibility under this subchapter terminates under circumstances described in clause (i), a local educational agency shall provide the child with a summary of the child's academic achievement and functional performance, which shall include recommendations on how to assist the child in meeting the child's postsecondary goals.

(d) Individualized education programs

(1) Definitions

In this chapter:

(A) Individualized education program

(i) In general

The term "individualized education program" or "IEP" means a written statement for each child with a disability that is developed, reviewed, and re-

vised in accordance with this section and that includes—

(I) a statement of the child's present levels of academic achievement and functional performance, including—

(aa) how the child's disability affects the child's involvement and progress in the general education curriculum;

(bb) for preschool children, as appropriate, how the disability affects the child's participation in appropriate activities; and

(cc) for children with disabilities who take alternate assessments aligned to alternate achievement standards, a description of benchmarks or short-term objectives;

(II) a statement of measurable annual goals, including academic and functional goals, designed to—

(aa) meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum; and

(bb) meet each of the child's other educational needs that result from the child's disability;

(III) a description of how the child's progress toward meeting the annual goals described in subclause (II) will be measured and when periodic reports on the progress the child is making toward meeting the annual goals (such as through the use of quarterly or other periodic reports, concurrent with the issuance of report cards) will be provided;

(IV) a statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child, or on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided for the child—

(aa) to advance appropriately toward attaining the annual goals;

(bb) to be involved in and make progress in the general education curriculum in accordance with subclause (I) and to

participate in extracurricular and other nonacademic activities; and

(cc) to be educated and participate with other children with disabilities and nondisabled children in the activities described in this subparagraph;

(V) an explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class and in the activities described in subclause (IV)(cc);

(VI)(aa) a statement of any individual appropriate accommodations that are necessary to measure the academic achievement and functional performance of the child on State and districtwide assessments consistent with section 1412(a)(16)(A) of this title; and

(bb) if the IEP Team determines that the child shall take an alternate assessment on a particular State or districtwide assessment of student achievement, a statement of why—

(AA) the child cannot participate in the regular assessment; and

(BB) the particular alternate assessment selected is appropriate for the child;

(VII) the projected date for the beginning of the services and modifications described in subclause (IV), and the anticipated frequency, location, and duration of those services and modifications; and

(VIII) beginning not later than the first IEP to be in effect when the child is 16, and updated annually thereafter—

(aa) appropriate measurable postsecondary goals based upon age appropriate transition assessments related to training, education, employment, and, where appropriate, independent living skills;

(bb) the transition services (including courses of study) needed to assist the child in reaching those goals; and

(cc) beginning not later than 1 year before the child reaches the age of majority under State law, a statement that the child has been informed of the child's rights under this chapter, if any, that will transfer to the child on

reaching the age of majority under section 1415(m) of this title.

(ii) Rule of construction

Nothing in this section shall be construed to require—

(I) that additional information be included in a child's IEP beyond what is explicitly required in this section; and

(II) the IEP Team to include information under 1 component of a child's IEP that is already contained under another component of such IEP.

(B) Individualized education program team

The term "individualized education program team" or "IEP Team" means a group of individuals composed of—

(i) the parents of a child with a disability;

(ii) not less than 1 regular education teacher of such child (if the child is, or may be, participating in the regular education environment);

(iii) not less than 1 special education teacher, or where appropriate, not less than 1 special education provider of such child;

(iv) a representative of the local educational agency who—

(I) is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities;

(II) is knowledgeable about the general education curriculum; and

(III) is knowledgeable about the availability of resources of the local educational agency;

(v) an individual who can interpret the instructional implications of evaluation results, who may be a member of the team described in clauses (ii) through (vi);

(vi) at the discretion of the parent or the agency, other individuals who have knowledge or special expertise regarding the child, including related services personnel as appropriate; and

(vii) whenever appropriate, the child with a disability.

(C) IEP Team attendance

(i) Attendance not necessary

A member of the IEP Team shall not be required to attend an IEP meeting, in whole or in part, if the parent of

a child with a disability and the local educational agency agree that the attendance of such member is not necessary because the member's area of the curriculum or related services is not being modified or discussed in the meeting.

(ii) Excusal

A member of the IEP Team may be excused from attending an IEP meeting, in whole or in part, when the meeting involves a modification to or discussion of the member's area of the curriculum or related services, if—

(I) the parent and the local educational agency consent to the excusal; and

(II) the member submits, in writing to the parent and the IEP Team, input into the development of the IEP prior to the meeting.

(iii) Written agreement and consent required

A parent's agreement under clause (i) and consent under clause (ii) shall be in writing.

(D) IEP Team transition

In the case of a child who was previously served under subchapter III, an invitation to the initial IEP meeting shall, at

the request of the parent, be sent to the subchapter III service coordinator or other representatives of the subchapter III system to assist with the smooth transition of services.

(2) Requirement that program be in effect

(A) In general

At the beginning of each school year, each local educational agency, State educational agency, or other State agency, as the case may be, shall have in effect, for each child with a disability in the agency's jurisdiction, an individualized education program, as defined in paragraph (1)(A).

(B) Program for child aged 3 through 5

In the case of a child with a disability aged 3 through 5 (or, at the discretion of the State educational agency, a 2-year-old child with a disability who will turn age 3 during the school year), the IEP Team shall consider the individualized family service plan that contains the material described in section 1436 of this title, and that is developed in accordance with this section, and the individualized family service plan may serve as the IEP of the child if using that plan as the IEP is—

(i) consistent with State policy; and

(ii) agreed to by the agency and the child's parents.

(C) Program for children who transfer school districts

(i) In general

(I) Transfer within the same State

In the case of a child with a disability who transfers school districts within the same academic year, who enrolls in a new school, and who had an IEP that was in effect in the same State, the local educational agency shall provide such child with a free appropriate public education, including services comparable to those described in the previously held IEP, in consultation with the parents until such time as the local educational agency adopts the previously held IEP or develops, adopts, and implements a new IEP that is consistent with Federal and State law.

(II) Transfer outside State

In the case of a child with a disability who transfers school districts within the same academic year, who enrolls in a new school, and who had an IEP that was in effect in another State, the local educational agency shall provide such child with a free appropriate

public education, including services comparable to those described in the previously held IEP, in consultation with the parents until such time as the local educational agency conducts an evaluation pursuant to subsection (a)(1), if determined to be necessary by such agency, and develops a new IEP, if appropriate, that is consistent with Federal and State law.

(ii) Transmittal of records

To facilitate the transition for a child described in clause (i)—

(I) the new school in which the child enrolls shall take reasonable steps to promptly obtain the child's records, including the IEP and supporting documents and any other records relating to the provision of special education or related services to the child, from the previous school in which the child was enrolled, pursuant to section 99.31(a)(2) of title 34, Code of Federal Regulations; and

(II) the previous school in which the child was enrolled shall take reasonable steps to promptly respond to such request from the new school.

(3) Development of IEP

(A) In general

In developing each child's IEP, the IEP Team, subject to subparagraph (C), shall consider—

(i) the strengths of the child;

(ii) the concerns of the parents for enhancing the education of their child;

(iii) the results of the initial evaluation or most recent evaluation of the child; and

(iv) the academic, developmental, and functional needs of the child.

(B) Consideration of special factors

The IEP Team shall—

(i) in the case of a child whose behavior impedes the child's learning or that of others, consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior;

(ii) in the case of a child with limited English proficiency, consider the language needs of the child as such needs relate to the child's IEP;

(iii) in the case of a child who is blind or visually impaired, provide for instruction in Braille and the use of

Braille unless the IEP Team determines, after an evaluation of the child's reading and writing skills, needs, and appropriate reading and writing media (including an evaluation of the child's future needs for instruction in Braille or the use of Braille), that instruction in Braille or the use of Braille is not appropriate for the child;

(iv) consider the communication needs of the child, and in the case of a child who is deaf or hard of hearing, consider the child's language and communication needs, opportunities for direct communications with peers and professional personnel in the child's language and communication mode, academic level, and full range of needs, including opportunities for direct instruction in the child's language and communication mode; and

(v) consider whether the child needs assistive technology devices and services.

(C) Requirement with respect to regular education teacher

A regular education teacher of the child, as a member of the IEP Team, shall, to the extent appropriate, participate in the development of the IEP of the child, including the determination of appropri-

ate positive behavioral interventions and supports, and other strategies, and the determination of supplementary aids and services, program modifications, and support for school personnel consistent with paragraph (1)(A)(i)(IV).

(D) Agreement

In making changes to a child's IEP after the annual IEP meeting for a school year, the parent of a child with a disability and the local educational agency may agree not to convene an IEP meeting for the purposes of making such changes, and instead may develop a written document to amend or modify the child's current IEP.

(E) Consolidation of IEP Team meetings

To the extent possible, the local educational agency shall encourage the consolidation of reevaluation meetings for the child and other IEP Team meetings for the child.

(F) Amendments

Changes to the IEP may be made either by the entire IEP Team or, as provided in subparagraph (D), by amending the IEP rather than by redrafting the entire IEP. Upon request, a parent shall be provided with a revised copy of the IEP with the amendments incorporated.

(4) Review and revision of IEP

(A) In general

The local educational agency shall ensure that, subject to subparagraph (B), the IEP Team—

(i) reviews the child's IEP periodically, but not less frequently than annually, to determine whether the annual goals for the child are being achieved; and

(ii) revises the IEP as appropriate to address—

(I) any lack of expected progress toward the annual goals and in the general education curriculum, where appropriate;

(II) the results of any reevaluation conducted under this section;

(III) information about the child provided to, or by, the parents, as described in subsection (c)(1)(B);

(IV) the child's anticipated needs; or

(V) other matters.

(B) Requirement with respect to regular education teacher

A regular education teacher of the child, as a member of the IEP Team, shall, consistent with paragraph (1)(C), participate in the review and revision of the IEP of the child.

(5) Multi-year IEP demonstration

(A) Pilot program

(i) Purpose

The purpose of this paragraph is to provide an opportunity for States to allow parents and local educational agencies the opportunity for long-term planning by offering the option of developing a comprehensive multi-year IEP, not to exceed 3 years, that is designed to coincide with the natural transition points for the child.

(ii) Authorization

In order to carry out the purpose of this paragraph, the Secretary is authorized to approve not more than 15 proposals from States to carry out the activity described in clause (i).

(iii) Proposal

(I) In general

A State desiring to participate in the program under this paragraph shall submit a proposal to

the Secretary at such time and in such manner as the Secretary may reasonably require.

(II) **Content**

The proposal shall include—

(aa) assurances that the development of a multi-year IEP under this paragraph is optional for parents;

(bb) assurances that the parent is required to provide informed consent before a comprehensive multi-year IEP is developed;

(cc) a list of required elements for each multi-year IEP, including—

(AA) measurable goals pursuant to paragraph (1)(A)(i)(II), coinciding with natural transition points for the child, that will enable the child to be involved in and make progress in the general education curriculum and that will meet the child's other needs that result from the child's disability; and

(BB) measurable annual goals for determining progress toward meeting the goals described in subitem (AA); and

(dd) a description of the process for the review and revision of each multi-year IEP, including—

(AA) a review by the IEP Team of the child's multi-year IEP at each of the child's natural transition points;

(BB) in years other than a child's natural transition points, an annual review of the child's IEP to determine the child's current levels of progress and whether the annual goals for the child are being achieved, and a requirement to amend the IEP, as appropriate, to enable the child to continue to meet the measurable goals set out in the IEP;

(CC) if the IEP Team determines on the basis of a review that the child is not making sufficient progress toward the goals described in the multi-year IEP, a requirement that the local educational agency shall ensure that the IEP Team carries out a more thorough review of the IEP in accordance with paragraph (4) within 30 calendar days; and

(DD) at the request of the parent, a requirement that the IEP Team shall conduct a review of the child's multi-year IEP rather than or subsequent to an annual review.

(B) Report

Beginning 2 years after December 3, 2004, the Secretary shall submit an annual report to the Committee on Education and the Workforce of the House of Representatives and the Committee on Health, Education, Labor, and Pensions of the Senate regarding the effectiveness of the program under this paragraph and any specific recommendations for broader implementation of such program, including—

(i) reducing—

(I) the paperwork burden on teachers, principals, administrators, and related service providers; and

(II) noninstructional time spent by teachers in complying with this subchapter;

(ii) enhancing longer-term educational planning;

(iii) improving positive outcomes for children with disabilities;

(iv) promoting collaboration between IEP Team members; and

(v) ensuring satisfaction of family members.

(C) Definition

In this paragraph, the term "natural transition points" means those periods that are close in time to the transition of a child with a disability from preschool to elementary grades, from elementary grades to middle or junior high school grades, from middle or junior high school grades to secondary school grades, and from secondary school grades to post-secondary activities, but in no case a period longer than 3 years.

(6) Failure to meet transition objectives

If a participating agency, other than the local educational agency, fails to provide the transition services described in the IEP in accordance with paragraph (1)(A)(i)(VIII), the local educational agency shall reconvene the IEP Team to identify alternative strategies to meet the transition objectives for the child set out in the IEP.

(7) Children with disabilities in adult prisons

(A) In general

The following requirements shall not apply to children with disabilities who are convicted as adults under State law and incarcerated in adult prisons:

(i) The requirements contained in section 1412(a)(16) of this title and paragraph (1)(A)(i)(VI) (relating to participation of children with disabilities in general assessments).

(ii) The requirements of items (aa) and (bb) of paragraph (1)(A)(i)(VIII) (relating to transition planning and transition services), do not apply with respect to such children whose eligibility under this subchapter will end, because of such children's age, before such children will be released from prison.

(B) Additional requirement

If a child with a disability is convicted as an adult under State law and incarcerated in an adult prison, the child's IEP Team may modify the child's IEP or placement notwithstanding the requirements of sections[1] 1412(a)(5)(A) of this title and paragraph (1)(A) if the State has demonstrated a bona fide security or compelling penological interest that cannot otherwise be accommodated.

(e) Educational placements

Each local educational agency or State educational agency shall ensure that the parents of each child with a disability are members of any

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[1] So in original. Probably should be "section"

group that makes decisions on the educational placement of their child.

(f) Alternative means of meeting participation

When conducting IEP team[2] meetings and placement meetings pursuant to this section, section 1415(e) of this title, and section 1415(f)(1)(B) of this title, and carrying out administrative matters under section 1415 of this title (such as scheduling, exchange of witness lists, and status conferences), the parent of a child with a disability and a local educational agency may agree to use alternative means of meeting participation, such as video conferences and conference calls.

4. 20 U.S.C. 1415 provides:

Procedural safeguards

(a) Establishment of procedures

Any State educational agency, State agency, or local educational agency that receives assistance under this subchapter shall establish and maintain procedures in accordance with this section to ensure that children with disabilities and their parents are guaranteed procedural safeguards with respect to the provision of a free appropriate public education by such agencies.

(b) Types of procedures

The procedures required by this section shall include the following:

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[2] So in original. Probably should be capitalized.

(1) An opportunity for the parents of a child with a disability to examine all records relating to such child and to participate in meetings with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child, and to obtain an independent educational evaluation of the child.

(2)(A) Procedures to protect the rights of the child whenever the parents of the child are not known, the agency cannot, after reasonable efforts, locate the parents, or the child is a ward of the State, including the assignment of an individual to act as a surrogate for the parents, which surrogate shall not be an employee of the State educational agency, the local educational agency, or any other agency that is involved in the education or care of the child. In the case of—

(i) a child who is a ward of the State, such surrogate may alternatively be appointed by the judge overseeing the child's care provided that the surrogate meets the requirements of this paragraph; and

(ii) an unaccompanied homeless youth as defined in section 11434a(6) of title 42, the local educational agency shall appoint a surrogate in accordance with this paragraph.

(B) The State shall make reasonable efforts to ensure the assignment of a surrogate not more than 30 days after there is a determination by the agency that the child needs a surrogate.

(3) Written prior notice to the parents of the child, in accordance with subsection (c)(1), whenever the local educational agency—

(A) proposes to initiate or change; or

(B) refuses to initiate or change, the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to the child.

(4) Procedures designed to ensure that the notice required by paragraph (3) is in the native language of the parents, unless it clearly is not feasible to do so.

(5) An opportunity for mediation, in accordance with subsection (e).

(6) An opportunity for any party to present a complaint—

(A) with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child; and

(B) which sets forth an alleged violation that occurred not more than 2 years before the date the parent or public agency knew or should have known about the alleged action that forms the basis of the complaint, or, if the State has an explicit time limitation for presenting such a complaint under this subchapter, in such time as the State law allows, except that the exceptions to the timeline described in subsection (f)(3)(D) shall apply to the timeline described in this subparagraph.

(7)(A) Procedures that require either party, or the attorney representing a party, to provide due process complaint notice in accordance with subsection (c)(2) (which shall remain confidential)—

(i) to the other party, in the complaint filed under paragraph (6), and forward a copy of such notice to the State educational agency; and

(ii) that shall include—

(I) the name of the child, the address of the residence of the child (or available contact information in the case of a homeless child), and the name of the school the child is attending;

(II) in the case of a homeless child or youth (within the meaning of section 11434a(2) of title 42), available contact information for the child and the name of the school the child is attending;

(III) a description of the nature of the problem of the child relating to such proposed initiation or change, including facts relating to such problem; and

(IV) a proposed resolution of the problem to the extent known and available to the party at the time.

(B) A requirement that a party may not have a due process hearing until the party, or the attorney representing the party, files a notice that meets the requirements of subparagraph (A)(ii).

(8) Procedures that require the State educational agency to develop a model form to assist par-

ents in filing a complaint and due process complaint notice in accordance with paragraphs (6) and (7), respectively.

(c) Notification requirements

(1) Content of prior written notice

The notice required by subsection (b)(3) shall include—

(A) a description of the action proposed or refused by the agency;

(B) an explanation of why the agency proposes or refuses to take the action and a description of each evaluation procedure, assessment, record, or report the agency used as a basis for the proposed or refused action;

(C) a statement that the parents of a child with a disability have protection under the procedural safeguards of this subchapter and, if this notice is not an initial referral for evaluation, the means by which a copy of a description of the procedural safeguards can be obtained;

(D) sources for parents to contact to obtain assistance in understanding the provisions of this subchapter;

(E) a description of other options considered by the IEP Team and the reason why those options were rejected; and

(F) a description of the factors that are relevant to the agency's proposal or refusal.

(2) Due process complaint notice

(A) Complaint

The due process complaint notice required under subsection (b)(7)(A) shall be deemed to be sufficient unless the party receiving the notice notifies the hearing officer and the other party in writing that the receiving party believes the notice has not met the requirements of subsection (b)(7)(A).

(B) Response to complaint

(i) Local educational agency response

(I) In general

If the local educational agency has not sent a prior written notice to the parent regarding the subject matter contained in the parent's due process complaint notice, such local educational agency shall, within 10 days of receiving the complaint, send to the parent a response that shall include—

(aa) an explanation of why the agency proposed or refused to take the action raised in the complaint;

(bb) a description of other options that the IEP Team considered and the reasons why those options were rejected;

(cc) a description of each evaluation procedure, assessment, record, or report the agency used as the basis

for the proposed or refused action; and

(dd) a description of the factors that are relevant to the agency's proposal or refusal.

(II) Sufficiency

A response filed by a local educational agency pursuant to subclause (I) shall not be construed to preclude such local educational agency from asserting that the parent's due process complaint notice was insufficient where appropriate.

(ii) Other party response

Except as provided in clause (i), the noncomplaining party shall, within 10 days of receiving the complaint, send to the complaint a response that specifically addresses the issues raised in the complaint.

(C) Timing

The party providing a hearing officer notification under subparagraph (A) shall provide the notification within 15 days of receiving the complaint.

(D) Determination

Within 5 days of receipt of the notification provided under subparagraph (C), the hearing officer shall make a determination on the face of the notice of whether the notification meets the requirements of subsection (b)(7)(A), and shall

immediately notify the parties in writing of such determination.

(E) Amended complaint notice

(i) In general

A party may amend its due process complaint notice only if—

(I) the other party consents in writing to such amendment and is given the opportunity to resolve the complaint through a meeting held pursuant to subsection (f)(1)(B); or

(II) the hearing officer grants permission, except that the hearing officer may only grant such permission at any time not later than 5 days before a due process hearing occurs.

(ii) Applicable timeline

The applicable timeline for a due process hearing under this subchapter shall recommence at the time the party files an amended notice, including the timeline under subsection (f)(1)(B).

(d) Procedural safeguards notice

(1) In general

(A) Copy to parents

A copy of the procedural safeguards available to the parents of a child with a disability shall be given to the parents only 1 time a year,

except that a copy also shall be given to the parents—

(i) upon initial referral or parental request for evaluation;

(ii) upon the first occurrence of the filing of a complaint under subsection (b)(6); and

(iii) upon request by a parent.

(B) Internet website

A local educational agency may place a current copy of the procedural safeguards notice on its Internet website if such website exists.

(2) Contents

The procedural safeguards notice shall include a full explanation of the procedural safeguards, written in the native language of the parents (unless it clearly is not feasible to do so) and written in an easily understandable manner, available under this section and under regulations promulgated by the Secretary relating to—

(A) independent educational evaluation;

(B) prior written notice;

(C) parental consent;

(D) access to educational records;

(E) the opportunity to present and resolve complaints, including—

(i) the time period in which to make a complaint;

(ii) the opportunity for the agency to resolve the complaint; and

(iii) the availability of mediation;

(F) the child's placement during pendency of due process proceedings;

(G) procedures for students who are subject to placement in an interim alternative educational setting;

(H) requirements for unilateral placement by parents of children in private schools at public expense;

(I) due process hearings, including requirements for disclosure of evaluation results and recommendations;

(J) State-level appeals (if applicable in that State);

(K) civil actions, including the time period in which to file such actions; and

(L) attorneys' fees.

(e) Mediation

(1) In general

Any State educational agency or local educational agency that receives assistance under this subchapter shall ensure that procedures are established and implemented to allow parties to disputes involving any matter, including matters arising prior to the filing of a complaint pursuant to subsection (b)(6), to resolve such disputes through a mediation process.

(2) Requirements

Such procedures shall meet the following requirements:

(A) The procedures shall ensure that the mediation process—

(i) is voluntary on the part of the parties;

(ii) is not used to deny or delay a parent's right to a due process hearing under subsection (f), or to deny any other rights afforded under this subchapter; and

(iii) is conducted by a qualified and impartial mediator who is trained in effective mediation techniques.

(B) OPPORTUNITY TO MEET WITH A DISINTERESTED PARTY.—A local educational agency or a State agency may establish procedures to offer to parents and schools that choose not to use the mediation process, an opportunity to meet, at a time and location convenient to the parents, with a disinterested party who is under contract with—

(i) a parent training and information center or community parent resource center in the State established under section 1471 or 1472 of this title; or

(ii) an appropriate alternative dispute resolution entity,

to encourage the use, and explain the benefits, of the mediation process to the parents.

(C) LIST OF QUALIFIED MEDIATORS.—The State shall maintain a list of individuals who are qualified mediators and knowledgeable in laws and regulations relating to the provision of special education and related services.

(D) COSTS.—The State shall bear the cost of the mediation process, including the costs of meetings described in subparagraph (B).

(E) SCHEDULING AND LOCATION.—Each session in the mediation process shall be scheduled in a timely manner and shall be held in a location that is convenient to the parties to the dispute.

(F) WRITTEN AGREEMENT.—In the case that a resolution is reached to resolve the complaint through the mediation process, the parties shall execute a legally binding agreement that sets forth such resolution and that—

(i) states that all discussions that occurred during the mediation process shall be confidential and may not be used as evidence in any subsequent due process hearing or civil proceeding;

(ii) is signed by both the parent and a representative of the agency who has the authority to bind such agency; and

(iii) is enforceable in any State court of competent jurisdiction or in a district court of the United States.

(G) MEDIATION DISCUSSIONS.—Discussions that occur during the mediation process shall be

confidential and may not be used as evidence in any subsequent due process hearing or civil proceeding.

(f) Impartial due process hearing

(1) In general

(A) Hearing

Whenever a complaint has been received under subsection (b)(6) or (k), the parents or the local educational agency involved in such complaint shall have an opportunity for an impartial due process hearing, which shall be conducted by the State educational agency or by the local educational agency, as determined by State law or by the State educational agency.

(B) Resolution session

(i) Preliminary meeting

Prior to the opportunity for an impartial due process hearing under subparagraph (A), the local educational agency shall convene a meeting with the parents and the relevant member or members of the IEP Team who have specific knowledge of the facts identified in the complaint—

(I) within 15 days of receiving notice of the parents' complaint;

(II) which shall include a representative of the agency who has decision-making authority on behalf of such agency;

(III) which may not include an attorney of the local educational agency unless the parent is accompanied by an attorney; and

(IV) where the parents of the child discuss their complaint, and the facts that form the basis of the complaint, and the local educational agency is provided the opportunity to resolve the complaint,

unless the parents and the local educational agency agree in writing to waive such meeting, or agree to use the mediation process described in subsection (e).

(ii) Hearing

If the local educational agency has not resolved the complaint to the satisfaction of the parents within 30 days of the receipt of the complaint, the due process hearing may occur, and all of the applicable timelines for a due process hearing under this subchapter shall commence.

(iii) Written settlement agreement

In the case that a resolution is reached to resolve the complaint at a meeting described in clause (i), the parties shall execute a legally binding agreement that is—

(I) signed by both the parent and a representative of the agency who has the authority to bind such agency; and

(II) enforceable in any State court of competent jurisdiction or in a district court of the United States.

(iv) Review period

If the parties execute an agreement pursuant to clause (iii), a party may void such agreement within 3 business days of the agreement's execution.

(2) Disclosure of evaluations and recommendations

(A) In general

Not less than 5 business days prior to a hearing conducted pursuant to paragraph (1), each party shall disclose to all other parties all evaluations completed by that date, and recommendations based on the offering party's evaluations, that the party intends to use at the hearing.

(B) Failure to disclose

A hearing officer may bar any party that fails to comply with subparagraph (A) from introducing the relevant evaluation or recommendation at the hearing without the consent of the other party.

(3) Limitations on hearing

(A) Person conducting hearing

A hearing officer conducting a hearing pursuant to paragraph (1)(A) shall, at a minimum—

(i) not be—

(I) an employee of the State educational agency or the local educational agency involved in the education or care of the child; or

(II) a person having a personal or professional interest that conflicts with the person's objectivity in the hearing;

(ii) possess knowledge of, and the ability to understand, the provisions of this chapter, Federal and State regulations pertaining to this chapter, and legal interpretations of this chapter by Federal and State courts;

(iii) possess the knowledge and ability to conduct hearings in accordance with appropriate, standard legal practice; and

(iv) possess the knowledge and ability to render and write decisions in accordance with appropriate, standard legal practice.

(B) Subject matter of hearing

The party requesting the due process hearing shall not be allowed to raise issues at the due process hearing that were not raised in the notice filed under subsection (b)(7), unless the other party agrees otherwise.

(C) Timeline for requesting hearing

A parent or agency shall request an impartial due process hearing within 2 years of the date the parent or agency knew or should have known about the alleged action that forms the basis of

the complaint, or, if the State has an explicit time limitation for requesting such a hearing under this subchapter, in such time as the State law allows.

(D) Exceptions to the timeline

The timeline described in subparagraph (C) shall not apply to a parent if the parent was prevented from requesting the hearing due to—

(i) specific misrepresentations by the local educational agency that it had resolved the problem forming the basis of the complaint; or

(ii) the local educational agency's withholding of information from the parent that was required under this subchapter to be provided to the parent.

(E) Decision of hearing officer

(i) In general

Subject to clause (ii), a decision made by a hearing officer shall be made on substantive grounds based on a determination of whether the child received a free appropriate public education.

(ii) Procedural issues

In matters alleging a procedural violation, a hearing officer may find that a child did not receive a free appropriate public education only if the procedural inadequacies—

(I) impeded the child's right to a free appropriate public education;

(II) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a free appropriate public education to the parents' child; or

(III) caused a deprivation of educational benefits.

(iii) Rule of construction

Nothing in this subparagraph shall be construed to preclude a hearing officer from ordering a local educational agency to comply with procedural requirements under this section.

(F) Rule of construction

Nothing in this paragraph shall be construed to affect the right of a parent to file a complaint with the State educational agency.

(g) Appeal

(1) In general

If the hearing required by subsection (f) is conducted by a local educational agency, any party aggrieved by the findings and decision rendered in such a hearing may appeal such findings and decision to the State educational agency.

(2) Impartial review and independent decision

The State educational agency shall conduct an impartial review of the findings and decision appealed under paragraph (1). The officer conducting such review shall make an independent decision upon completion of such review.

(h) Safeguards

Any party to a hearing conducted pursuant to subsection (f) or (k), or an appeal conducted pursuant to subsection (g), shall be accorded—

(1) the right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities;

(2) the right to present evidence and confront, cross-examine, and compel the attendance of witnesses;

(3) the right to a written, or, at the option of the parents, electronic verbatim record of such hearing; and

(4) the right to written, or, at the option of the parents, electronic findings of fact and decisions, which findings and decisions—

(A) shall be made available to the public consistent with the requirements of section 1417(b) of this title (relating to the confidentiality of data, information, and records); and

(B) shall be transmitted to the advisory panel established pursuant to section 1412(a)(21) of this title.

(i) Administrative procedures

(1) In general

(A) Decision made in hearing

A decision made in a hearing conducted pursuant to subsection (f) or (k) shall be final, ex-

cept that any party involved in such hearing may appeal such decision under the provisions of subsection (g) and paragraph (2).

(B) Decision made at appeal

A decision made under subsection (g) shall be final, except that any party may bring an action under paragraph (2).

(2) Right to bring civil action

(A) In general

Any party aggrieved by the findings and decision made under subsection (f) or (k) who does not have the right to an appeal under subsection (g), and any party aggrieved by the findings and decision made under this subsection, shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States, without regard to the amount in controversy.

(B) Limitation

The party bringing the action shall have 90 days from the date of the decision of the hearing officer to bring such an action, or, if the State has an explicit time limitation for bringing such action under this subchapter, in such time as the State law allows.

(C) Additional requirements

In any action brought under this paragraph, the court—

(i) shall receive the records of the administrative proceedings;

(ii) shall hear additional evidence at the request of a party; and

(iii) basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

(3) Jurisdiction of district courts; attorneys' fees

(A) In general

The district courts of the United States shall have jurisdiction of actions brought under this section without regard to the amount in controversy.

(B) Award of attorneys' fees

(i) In general

In any action or proceeding brought under this section, the court, in its discretion, may award reasonable attorneys' fees as part of the costs—

(I) to a prevailing party who is the parent of a child with a disability;

(II) to a prevailing party who is a State educational agency or local educational agency against the attorney of a parent who files a complaint or subsequent cause of action that is frivolous, unreasonable, or without foundation, or against the attorney of a parent who continued to litigate after the litigation

clearly became frivolous, unreasonable, or without foundation; or

(III) to a prevailing State educational agency or local educational agency against the attorney of a parent, or against the parent, if the parent's complaint or subsequent cause of action was presented for any improper purpose, such as to harass, to cause unnecessary delay, or to needlessly increase the cost of litigation.

(ii) Rule of construction

Nothing in this subparagraph shall be construed to affect section 327 of the District of Columbia Appropriations Act, 2005.

(C) Determination of amount of attorneys' fees

Fees awarded under this paragraph shall be based on rates prevailing in the community in which the action or proceeding arose for the kind and quality of services furnished. No bonus or multiplier may be used in calculating the fees awarded under this subsection.

(D) Prohibition of attorneys' fees and related costs for certain services

(i) In general

Attorneys' fees may not be awarded and related costs may not be reimbursed in any action or proceeding under this section for services performed subsequent to the time

of a written offer of settlement to a parent if—

(I) the offer is made within the time prescribed by Rule 68 of the Federal Rules of Civil Procedure or, in the case of an administrative proceeding, at any time more than 10 days before the proceeding begins;

(II) the offer is not accepted within 10 days; and

(III) the court or administrative hearing officer finds that the relief finally obtained by the parents is not more favorable to the parents than the offer of settlement.

(ii) IEP Team meetings

Attorneys' fees may not be awarded relating to any meeting of the IEP Team unless such meeting is convened as a result of an administrative proceeding or judicial action, or, at the discretion of the State, for a mediation described in subsection (e).

(iii) Opportunity to resolve complaints

A meeting conducted pursuant to subsection (f)(1)(B)(i) shall not be considered—

(I) a meeting convened as a result of an administrative hearing or judicial action; or

(II) an administrative hearing or judicial action for purposes of this paragraph.

(E) Exception to prohibition on attorneys' fees and related costs

Notwithstanding subparagraph (D), an award of attorneys' fees and related costs may be made to a parent who is the prevailing party and who was substantially justified in rejecting the settlement offer.

(F) Reduction in amount of attorneys' fees

Except as provided in subparagraph (G), whenever the court finds that—

(i) the parent, or the parent's attorney, during the course of the action or proceeding, unreasonably protracted the final resolution of the controversy;

(ii) the amount of the attorneys' fees otherwise authorized to be awarded unreasonably exceeds the hourly rate prevailing in the community for similar services by attorneys of reasonably comparable skill, reputation, and experience;

(iii) the time spent and legal services furnished were excessive considering the nature of the action or proceeding; or

(iv) the attorney representing the parent did not provide to the local educational agency the appropriate information in the

notice of the complaint described in subsection (b)(7)(A),

the court shall reduce, accordingly, the amount of the attorneys' fees awarded under this section.

(G) Exception to reduction in amount of attorneys' fees

The provisions of subparagraph (F) shall not apply in any action or proceeding if the court finds that the State or local educational agency unreasonably protracted the final resolution of the action or proceeding or there was a violation of this section.

(j) Maintenance of current educational placement

Except as provided in subsection (k)(4), during the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents otherwise agree, the child shall remain in the then-current educational placement of the child, or, if applying for initial admission to a public school, shall, with the consent of the parents, be placed in the public school program until all such proceedings have been completed.

(k) Placement in alternative educational setting

(1) Authority of school personnel

(A) Case-by-case determination

School personnel may consider any unique circumstances on a case-by-case basis when determining whether to order a change in place-

ment for a child with a disability who violates a code of student conduct.

(B) Authority

School personnel under this subsection may remove a child with a disability who violates a code of student conduct from their current placement to an appropriate interim alternative educational setting, another setting, or suspension, for not more than 10 school days (to the extent such alternatives are applied to children without disabilities).

(C) Additional authority

If school personnel seek to order a change in placement that would exceed 10 school days and the behavior that gave rise to the violation of the school code is determined not to be a manifestation of the child's disability pursuant to subparagraph (E), the relevant disciplinary procedures applicable to children without disabilities may be applied to the child in the same manner and for the same duration in which the procedures would be applied to children without disabilities, except as provided in section 1412(a)(1) of this title although it may be provided in an interim alternative educational setting.

(D) Services

A child with a disability who is removed from the child's current placement under subparagraph (G) (irrespective of whether the behavior

is determined to be a manifestation of the child's disability) or subparagraph (C) shall—

(i) continue to receive educational services, as provided in section 1412(a)(1) of this title, so as to enable the child to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the child's IEP; and

(ii) receive, as appropriate, a functional behavioral assessment, behavioral intervention services and modifications, that are designed to address the behavior violation so that it does not recur.

(E) Manifestation determination

(i) In general

Except as provided in subparagraph (B), within 10 school days of any decision to change the placement of a child with a disability because of a violation of a code of student conduct, the local educational agency, the parent, and relevant members of the IEP Team (as determined by the parent and the local educational agency) shall review all relevant information in the student's file, including the child's IEP, any teacher observations, and any relevant information provided by the parents to determine—

(I) if the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability; or

(II) if the conduct in question was the direct result of the local educational agency's failure to implement the IEP.

(ii) Manifestation

If the local educational agency, the parent, and relevant members of the IEP Team determine that either subclause (I) or (II) of clause (i) is applicable for the child, the conduct shall be determined to be a manifestation of the child's disability.

(F) Determination that behavior was a manifestation

If the local educational agency, the parent, and relevant members of the IEP Team make the determination that the conduct was a manifestation of the child's disability, the IEP Team shall—

(i) conduct a functional behavioral assessment, and implement a behavioral intervention plan for such child, provided that the local educational agency had not conducted such assessment prior to such determination before the behavior that resulted in a change in placement described in subparagraph (C) or (G);

(ii) in the situation where a behavioral intervention plan has been developed, review the behavioral intervention plan if the child already has such a behavioral intervention plan, and modify it, as necessary, to address the behavior; and

(iii) except as provided in subparagraph (G), return the child to the placement from which the child was removed, unless the parent and the local educational agency agree to a change of placement as part of the modification of the behavioral intervention plan.

(G) Special circumstances

School personnel may remove a student to an interim alternative educational setting for not more than 45 school days without regard to whether the behavior is determined to be a manifestation of the child's disability, in cases where a child—

(i) carries or possesses a weapon to or at school, on school premises, or to or at a school function under the jurisdiction of a State or local educational agency;

(ii) knowingly possesses or uses illegal drugs, or sells or solicits the sale of a controlled substance, while at school, on school premises, or at a school function under the jurisdiction of a State or local educational agency; or

(iii) has inflicted serious bodily injury upon another person while at school, on school premises, or at a school function under the jurisdiction of a State or local educational agency.

(H) Notification

Not later than the date on which the decision to take disciplinary action is made, the local educational agency shall notify the parents of that decision, and of all procedural safeguards accorded under this section.

(2) Determination of setting

The interim alternative educational setting in subparagraphs (C) and (G) of paragraph (1) shall be determined by the IEP Team.

(3) Appeal

(A) In general

The parent of a child with a disability who disagrees with any decision regarding placement, or the manifestation determination under this subsection, or a local educational agency that believes that maintaining the current placement of the child is substantially likely to result in injury to the child or to others, may request a hearing.

(B) Authority of hearing officer

(i) In general

A hearing officer shall hear, and make a determination regarding, an appeal requested under subparagraph (A).

(ii) Change of placement order

In making the determination under clause (i), the hearing officer may order a change in placement of a child with a disabil-

ity. In such situations, the hearing officer may—

(I) return a child with a disability to the placement from which the child was removed; or

(II) order a change in placement of a child with a disability to an appropriate interim alternative educational setting for not more than 45 school days if the hearing officer determines that maintaining the current placement of such child is substantially likely to result in injury to the child or to others.

(4) Placement during appeals

When an appeal under paragraph (3) has been requested by either the parent or the local educational agency—

(A) the child shall remain in the interim alternative educational setting pending the decision of the hearing officer or until the expiration of the time period provided for in paragraph (1)(C), whichever occurs first, unless the parent and the State or local educational agency agree otherwise; and

(B) the State or local educational agency shall arrange for an expedited hearing, which shall occur within 20 school days of the date the hearing is requested and shall result in a determination within 10 school days after the hearing.

(5) Protections for children not yet eligible for special education and related services

(A) In general

A child who has not been determined to be eligible for special education and related services under this subchapter and who has engaged in behavior that violates a code of student conduct, may assert any of the protections provided for in this subchapter if the local educational agency had knowledge (as determined in accordance with this paragraph) that the child was a child with a disability before the behavior that precipitated the disciplinary action occurred.

(B) Basis of knowledge

A local educational agency shall be deemed to have knowledge that a child is a child with a disability if, before the behavior that precipitated the disciplinary action occurred—

(i) the parent of the child has expressed concern in writing to supervisory or administrative personnel of the appropriate educational agency, or a teacher of the child, that the child is in need of special education and related services;

(ii) the parent of the child has requested an evaluation of the child pursuant to section 1414(a)(1)(B) of this title; or

(iii) the teacher of the child, or other personnel of the local educational agency, has expressed specific concerns about a pat-

tern of behavior demonstrated by the child, directly to the director of special education of such agency or to other supervisory personnel of the agency.

(C) Exception

A local educational agency shall not be deemed to have knowledge that the child is a child with a disability if the parent of the child has not allowed an evaluation of the child pursuant to section 1414 of this title or has refused services under this subchapter or the child has been evaluated and it was determined that the child was not a child with a disability under this subchapter.

(D) Conditions that apply if no basis of knowledge

(i) In general

If a local educational agency does not have knowledge that a child is a child with a disability (in accordance with subparagraph (B) or (C)) prior to taking disciplinary measures against the child, the child may be subjected to disciplinary measures applied to children without disabilities who engaged in comparable behaviors consistent with clause (ii).

(ii) Limitations

If a request is made for an evaluation of a child during the time period in which the child is subjected to disciplinary measures under this subsection, the evaluation shall be

conducted in an expedited manner. If the child is determined to be a child with a disability, taking into consideration information from the evaluation conducted by the agency and information provided by the parents, the agency shall provide special education and related services in accordance with this subchapter, except that, pending the results of the evaluation, the child shall remain in the educational placement determined by school authorities.

(6) Referral to and action by law enforcement and judicial authorities

(A) Rule of construction

Nothing in this subchapter shall be construed to prohibit an agency from reporting a crime committed by a child with a disability to appropriate authorities or to prevent State law enforcement and judicial authorities from exercising their responsibilities with regard to the application of Federal and State law to crimes committed by a child with a disability.

(B) Transmittal of records

An agency reporting a crime committed by a child with a disability shall ensure that copies of the special education and disciplinary records of the child are transmitted for consideration by the appropriate authorities to whom the agency reports the crime.

(7) Definitions

In this subsection:

(A) Controlled substance

The term "controlled substance" means a drug or other substance identified under schedule I, II, III, IV, or V in section 202(c) of the Controlled Substances Act (21 U.S.C. 812(c)).

(B) Illegal drug

The term "illegal drug" means a controlled substance but does not include a controlled substance that is legally possessed or used under the supervision of a licensed health-care professional or that is legally possessed or used under any other authority under that Act [21 U.S.C. § 801 et seq.] or under any other provision of Federal law.

(C) Weapon

The term "weapon" has the meaning given the term "dangerous weapon" under section 930(g)(2) of title 18.

(D) Serious bodily injury

The term "serious bodily injury" has the meaning given the term "serious bodily injury" under paragraph (3) of subsection (h) of section 1365 of title 18.

(l) **Rule of construction**

Nothing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, the Americans with

Disabilities Act of 1990 [42 U.S.C. 12101 et seq.], title V of the Rehabilitation Act of 1973 [29 U.S.C. 791 et seq.], or other Federal laws protecting the rights of children with disabilities, except that before the filing of a civil action under such laws seeking relief that is also available under this subchapter, the procedures under subsections (f) and (g) shall be exhausted to the same extent as would be required had the action been brought under this subchapter.

(m) Transfer of parental rights at age of majority

(1) In general

A State that receives amounts from a grant under this subchapter may provide that, when a child with a disability reaches the age of majority under State law (except for a child with a disability who has been determined to be incompetent under State law)—

(A) the agency shall provide any notice required by this section to both the individual and the parents;

(B) all other rights accorded to parents under this subchapter transfer to the child;

(C) the agency shall notify the individual and the parents of the transfer of rights; and

(D) all rights accorded to parents under this subchapter transfer to children who are incarcerated in an adult or juvenile Federal, State, or local correctional institution.

(2) Special rule

If, under State law, a child with a disability who has reached the age of majority under State law, who has not been determined to be incompetent, but who is determined not to have the ability to provide informed consent with respect to the educational program of the child, the State shall establish procedures for appointing the parent of the child, or if the parent is not available, another appropriate individual, to represent the educational interests of the child throughout the period of eligibility of the child under this subchapter.

(n) Electronic mail

A parent of a child with a disability may elect to receive notices required under this section by an electronic mail (e-mail) communication, if the agency makes such option available.

***(o)* Separate complaint**

Nothing in this section shall be construed to preclude a parent from filing a separate due process complaint on an issue separate from a due process complaint already filed.

5. 29 U.S.C. 794 (2012 & Supp. II 2014) provides:

Nondiscrimination under Federal grants and programs

(a) Promulgation of rules and regulations

No otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the bene-

fits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.

(b) **"Program or activity" defined**

For the purposes of this section, the term "program or activity" means all of the operations of—

(1)(A) a department, agency, special purpose district, or other instrumentality of a State or of a local government; or

(B) the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;

(2)(A) a college, university, or other postsecondary institution, or a public system of higher education; or

(B) a local educational agency (as defined in section 7801 of title 20), system of career and technical education, or other school system;

(3)(A) an entire corporation, partnership, or other private organization, or an entire sole proprietorship—

(i) if assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or

(ii) which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or

(B) the entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in the case of any other corporation, partnership, private organization, or sole proprietorship; or

(4) any other entity which is established by two or more of the entities described in paragraph (1), (2), or (3);

any part of which is extended Federal financial assistance.

(c) Significant structural alterations by small providers

Small providers are not required by subsection (a) of this section to make significant structural alterations to their existing facilities for the purpose of assuring program accessibility, if alternative means of providing the services are available. The terms used in this subsection shall be construed with reference to the regulations existing on March 22, 1988.

(d) Standards used in determining violation of section

The standards used to determine whether this section has been violated in a complaint alleging employment discrimination under this section shall be the standards applied under title I of the Americans with Disabilities Act of 1990 (42 U.S.C. 12111 et seq.) and the provisions of sections 501 through 504, and 510,[1] of the Americans with Disabilities Act of 1990 (42 U.S.C. 12201-12204 and 12210), as such sections relate to employment.

6. 29 U.S.C. 794a provides:

Remedies and attorney fees

(a)(1) The remedies, procedures, and rights set forth in section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16), including the application of sections 706(f) through 706(k) (42 U.S.C. 2000e-5(f) through (k)) (and the application of section 706(e)(3) (42 U.S.C. 2000e-5(e)(3)) to claims of discrimination in compensation), shall be available, with respect to any complaint under section 791 of this title, to any employee or applicant for employment aggrieved by the final disposition of such complaint, or by the failure to take final action on such complaint. In fashioning an equitable or affirmative action remedy under such section, a court may take into account the reasonableness of the cost of any necessary work place accommodation, and the availability of alternatives therefor or other

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[1] See References in Text note below.

appropriate relief in order to achieve an equitable and appropriate remedy.

(2) The remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.) (and in subsection (e)(3) of section 706 of such Act (42 U.S.C. 2000e-5), applied to claims of discrimination in compensation) shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section 794 of this title.

(b) In any action or proceeding to enforce or charge a violation of a provision of this subchapter, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

7. 42 U.S.C. 12132 provides:

Discrimination

Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

8. 42 U.S.C. 12201 provides in pertinent part:

Construction

(a) In general

Except as otherwise provided in this chapter, nothing in this chapter shall be construed to apply a lesser standard than the standards applied under title V of the Rehabilitation Act of 1973 (29 U.S.C. 790 et seq.) or the regulations issued by Federal agencies pursuant to such title.

(b) Relationship to other laws

Nothing in this chapter shall be construed to invalidate or limit the remedies, rights, and procedures of any Federal law or law of any State or political subdivision of any State or jurisdiction that provides greater or equal protection for the rights of individuals with disabilities than are afforded by this chapter. Nothing in this chapter shall be construed to preclude the prohibition of, or the imposition of restrictions on, smoking in places of employment covered by subchapter I, in transportation covered by subchapter II or III, or in places of public accommodation covered by subchapter III.

* * * * *

9. 28 C.F.R. 35.130 provides in pertinent part:

General prohibitions against discrimination.

(a) No qualified individual with a disability shall, on the basis of disability, be excluded from participation in or be denied the benefits of the services, pro-

grams, or activities of a public entity, or be subjected to discrimination by any public entity.

* * * * *

(b)(7) A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.

* * * * *

10. 28 C.F.R. 35.136(a) provides:

Service animals.

(a) *General.* Generally, a public entity shall modify its policies, practices, or procedures to permit the use of a service animal by an individual with a disability.

11. 28 C.F.R. 41.51 provides in pertinent part:

General prohibitions against discrimination.

(a) No qualified handicapped person, shall, on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity that receives or benefits from federal financial assistance.

(b)(1) A recipient, in providing any aid, benefit, or service, may not, directly or through contractual, li-

censing, or other arrangements, on the basis of handicap:

(i) Deny a qualified handicapped person the opportunity to participate in or benefit from the aid, benefit, or service;

(ii) Afford a qualified handicapped person an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others;

(iii) Provide a qualified handicapped person with an aid, benefit, or service that is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others;

(iv) Provide different or separate aid, benefits, or services to handicapped persons or to any class of handicapped persons than is provided to others unless such action is necessary to provide qualified handicapped persons with aid, benefits, or services that are as effective as those provided to others;

(v) Aid or perpetuate discrimination against a qualified handicapped person by providing significant assistance to an agency, organization, or person that discriminates on the basis of handicap in providing any aid, benefit, or service to beneficiaries of the recipient's program;

(vi) Deny a qualified handicapped person the opportunity to participate as a member of planning or advisory boards; or

(vii) Otherwise limit a qualified handicapped person in the enjoyment of any right, privilege, advan-

tage, or opportunity enjoyed by others receiving the aid, benefit, or service.

* * * * *

12. 34 C.F.R. 104.4 provides in pertinent part:

Discrimination prohibited.

(a) *General.* No qualified handicapped person shall, on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity which receives Federal financial assistance.

* * * * *

(b)(2) For purposes of this part, aids, benefits, and services, to be equally effective, are not required to produce the identical result or level of achievement for handicapped and nonhandicapped persons, but must afford handicapped person equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement, in the most integrated setting appropriate to the person's needs.

(3) Despite the existence of separate or different aid, benefits, or services provided in accordance with this part, a recipient may not deny a qualified handicapped person the opportunity to participate in such aid, benefits, or services that are not separate or different.

(4) A recipient may not, directly or through contractual or other arrangements, utilize criteria or methods of administration (i) that have the effect of subjecting qualified handicapped persons to discrimi-

nation on the basis of handicap, (ii) that have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the recipient's program or activity with respect to handicapped persons, or (iii) that perpetuate the discrimination of another recipient if both recipients are subject to common administrative control or are agencies of the same State.

* * * * *

13. 34 C.F.R. 104.33 provides in pertinent part:

Free appropriate public education.

(a) *General.* A recipient that operates a public elementary or secondary education program or activity shall provide a free appropriate public education to each qualified handicapped person who is in the recipient's jurisdiction, regardless of the nature or severity of the person's handicap.

(b) *Appropriate education.* (1) For the purpose of this subpart, the provision of an appropriate education is the provision of regular or special education and related aids and services that (i) are designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met and (ii) are based upon adherence to procedures that satisfy the requirements of §§104.34, 104.35, and 104.36.

(2) Implementation of an Individualized Education Program developed in accordance with the Education of the Handicapped Act is one means of meeting the standard established in paragraph (b)(1)(i) of this section.

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